This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY
3 2044 078 568 383

Digitized by Google

HARVARD LAW LIBRARY

Received APR 21 1914

Digitized by Google

Digitized by Google

HARVARD LAW LIBRARY

Received APR 21 1914

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

OF THE

STATE OF MISSOURI

REPORTED FOR THE

ST. LOUIS COURT OF APPEALS

May 6, 1913.

BY THOMAS E. FRANCIS of the St. Louis Bar.

FOR THE

KANSAS CITY COURT OF APPEALS

June 30, 1913 to December 12, 1913.

BY JOHN M. CLEARY of the Kansas City Bar.

AND FOR THE

SPRINGFIELD COURT OF APPEALS

No case reported for this volume.

OFFICIAL REPORTERS.

VOL. 174.

E. W. STEPHENS PUBLISHING CO.
COLUMBIA, MO.

Digitized by Google

Entered according to Act of Congress, in the year 1913, by

E. W. STEPHENS PUB. CO.

In the office of the Librarian of Congress at Washington, D. C.

APR 24 1914

Digitized by Google

JUDGES OF THE
ST. LOUIS COURT OF APPEALS.

HON. GEORGE D. REYNOLDS, *Presiding Judge.*
HON. ALBERT D. NORTONI, } *Judges.*
HON. WILLIAM H. ALLEN, }
JOSEPH FLORY, *Clerk.*
THOMAS E. FRANCIS, *Reporter.*

JUDGES OF THE
KANSAS CITY COURT OF APPEALS.

HON. JAMES ELLISON, *Presiding Judge.*
HON. JAMES M. JOHNSON, } *Judges.*
HON. FRANCIS H. TRIMBLE, }
L. F. McCOY, *Clerk.*
JOHN M. CLEARY, *Reporter.*

JUDGES OF THE
SPRINGFIELD COURT OF APPEALS.

HON. WILLIAM R. ROBERTSON, *Presiding Judge.*
HON. JOHN S. FARRINGTON, } *Judges.*
HON. JOHN T. STURGIS, }
GEORGE H. DANIEL, *Clerk.*
MORRISON PRITCHETT, *Reporter.*

Digitized by Google

CASES REPORTED.

A.

Adams v. Metropolitan St. Ry. Co. 5
American Silver Mfg. Co. v. Wabash R. R. Co. 184
American Clay Machinery Co. v. Sedalia B. & T. Co. 485
American Ins. Co., Patterson v. 37
American Mfg. Co., Finuta v. 87
Avery Company v. Powell 628

B.

Backer v. Seaboard F. & M. Ins. Co. 82
Badger Lbr. Co. v. Lyons I. &. P. Co., et al. 414
Bank of Conception, State ex rel. v. 589
Bank of Mercer County, Boyd v. 431
Bante v. Bante 123
Barber Asphalt Paving Co., Jones v. 393
Barber Asphalt Paving Co. v. Field, et. al. 11
Beach, Whitelock et al. v. 428
Bliesner v. Riesmeyer Distilling Co. 139
Boonville Special Road District v. Fuser 573
Boyd v. Bank of Mercer County 431
Braden v. C. B. & Q. R. R. Co. 584
Burk Bros. M. & P. Co., Hanlin v. 462
Burt et al. v. Gabbert 521

C.

Camren et. al. v. Squires 272
Case Threshing Machine Co. v. Tomlin, et. al. 512
Chappell v. United Railways Co. 126
Chicago & Alton R. R. Co., Globe & Rutgers Fire Ins. Co. v. 542
Chicago & Alton R. R. Co., Fife v. 655
C. B. & Q. R. R. Co., Braden v. 584
C. B. & Q. R. R. Co., Hickey v. 408
C. B. & Q. R. R. Co., Gregory v. 550
C. M. & St. P. Ry. Co., Johnson v. 16
C. R. I. & P. Ry. Co., Pontius, Admx. v. 576
Citizens State Bank of Trenton v. Shanklin 639
City of Jefferson, Trippensee v. 727
City of St. Joseph et. al., Livingston v. 636
City of Maryville, Price v. 698
Coby v. Q. O. & K. C. R. R. Co. 648
Cole v. Crump et. al. 215
Cole v. Marler et. al. 223
Crowley v. Dagley, Admr. 561
Crump et. al., Cole v. 215
Cummings, Shull v. 569

D.

Day et. al. v. Supreme Forest, Woodmen Circle 260
Dagley, Admr., Crowley v. 561
Davis v. Davis 538

Digitized by Google

E.

Ebert, Admx v. Metropolitan St. Ry. Co. ... 45
Erdmann v. United Rys. Co. ... 245
Esque v. United Rys. Co. ... 317
Excelsior Stove Mfg. Co. v. Million ... 718

F.

Farmers Coal Co., Martin v. ... 441
Featherstone v. K. C. Terminal Ry. Co. ... 664
Fee, Kansas City v. ... 501
Feitz, State ex rel v. ... 456
Field et. al., Barber Asphalt Paving Co. v. ... 11
Fife v. C. & A. R. R. Co. ... 655
Finuta v. American Mfg. Co. ... 87
Fulbright et. al., Hopper v. ... 499
Fuser, Boonville Special Road District v. ... 573
Freeborn Engineering & Construction Co., Jackson County ex rel. v. ... 28

G.

Gabbert, Burt et. al. v. ... 521
Gilfillan et. al. v. Welsh ... 1
Gilsonite Construction Co. v. Greffet ... 176
Globe & Rutgers Fire Ins. v. C. & A. R. R. Co. ... 542
Goodes v. Order U. T. C. of A. ... 330
Greely et. al., Mitchell v. ... 250
Gregory v. C. B. & Q. R. R. Co. ... 550
Greffet, Gilsonite Construction Co. v. ... 176

H.

Hanlin v. Burk Bros. M. & P. Co. ... 462
Harrington, Martin v. ... 707
Hartung v. Northwestern Mutual Life Ins. Co. ... 289
Hatfield v. Swift ... 705
Hedrick v. Kahmann, et. al. ... 57
Hesse Envelope Co., Westminster Laundry Co. v. ... 238
Hickey v. C. B. & Q. R. R. Co. ... 408
Hopper v. Fulbright et. al. ... 499

J.

Jackson County ex rel. v. Freeborn Engineering & Construction Co. ... 28
Jackson v. Western Union Telegraph Co. ... 70
Johnson v. C. M. & St. P. Ry. Co. ... 16
Jones v. Barber Asphalt Paving Co. ... 393

K.

Kahmann et. al., Hedrick v. ... 57
K. C. Terminal Ry. Co., Featherstone v. ... 664
Kansas City v. Fee ... 501
Kansas City Pump Co. v. Vrooman et. al. ... 63
Keys et. al. v. Natl. Council K. & L. of Security ... 671
Kerns & Lorton v. Western Union Telegraph Co. ... 435
Koehler, In re ... 297

L.

Lamb, State ex rel. v. ... 360
Leschen & Sons Rope Co., Mertz v. ... 94
Livingston v. City of St. Joseph et. al. ... 636
Lyons I. & P. Co. et. al., Badger Lumber Co. v. ... 414

Digitized by Google

Mc.

McCaskey v. Q. O. & K. C. R. R. Co.... 724

M.

Mallory v. Patterson.... 605
Marler et. al., Cole v.... 223
Martin v. Farmers Coal Co.... 441
Martin v. Harrington.... 707
Matthews, Winfrey v.... 713
Maurer, State v.... 162
Metropolitan St. Ry. Co., Adams v.... 5
Metropolitan St. Ry. Co., Ebert, Admx v.... 45
Metcalf et. al., Oil Well Supply Co. v.... 555
Mertz v. Leschen & Sons Rope Co.... 94
Miles, Jr., State v.... 181
Million, Excelsior Stove Mfg. Co. v.... 718
Mitchell v. Greely et. al.... 250
Mo. Pac. Ry. Co., Yontz v.... 482

N.

Natl. Council K. & L. of Security, Keys et. al. v.... 671
New York Life Ins. Co., Pierce v.... 383
Newman v. Tootle Camp-Bell Dry Goods Co.... 528
Northwestern Mutual Life Ins. Co., Hartung v.... 289

O.

Order of U. T. C. of A., Goodes v.... 330
Oil Well Supply Co. v. Metcalf et. al.... 555

P.

Pace et. al. v. St. Louis Southwestern Ry. Co.... 227
Pasche et. al. v. South St. J. Town Co., et. al.... 614
Patterson, Mallory v.... 605
Patterson v. American Ins. Co.... 37
Pierce v. New York Life Ins. Co.... 383
Pollock, Porch v.... 427
Pontius Admx. v. C. R. I. & P. Ry. Co.... 576
Porch v. Pollock.... 427
Powell, Avery Company v.... 628
Price v. City of Maryville.... 698
Prudential Ins. Co. of America, Wallace v.... 110

Q.

Q. O. & K. C. R. R. Co., Coby v.... 648
Q. O. & K. C. R. R. Co., McCaskey v.... 724

R.

Rea v. Rea.... 715
Reismeyer Distilling Co., Bliesner v.... 139
Rubey Trust Co. v. Weidner.... 692
Ryan, In re Estate.... 202

S.

Seaboard F. & M. Ins. Co., Backer v.... 82
Sedalia B. & T. Co., American Clay Machinery Co. v.... 485
Shanklin, Citizen State Bank of Trenton v.... 639
Shortell, State v.... 153
Shull v. Cummings.... 569

Digitized by Google

South St. J. Town Co., et. al., Pasche et. al. v. 614
Squires, Camren et. al. v. 272
St. Louis Southwestern Ry. Co., Pace et. al. v. 227
St. J. Ry. L. H. & P. Co., Van Loon v. 372
State ex rel. v. The Bank of Conception 589
State ex rel. v. Feitz 456
State ex rel. v. Lamb 360
State ex rel. v. Thornhill et. al. 469
State v. Maurer 162
State v. Miles, Jr. 181
State v. Shortell 153
State v. Surkamp 174
Stowell et. al., Walmsley v. 67
Supreme Forest, Woodmen Circle, Day et. al. v. 260
Surkamp, State v. 174
Swift, Hatfield v. 705

T.

Thornhill et. al., State ex rel. v. 469
Tomlin et. al., Case Threshing Machine Co. v. 512
Tootle-Camp-Bell Dry Goods Co., Newman v. 528
Trippensee v. City of Jefferson 727

U.

United Rys. Co., Chappell v. 126
United Rys. Co., Erdmann v. 245
United Rys. Co., Esque v. 317

V.

Van Loon v. St. J. Ry. H. & P. Co. 372
Vrooman et. al., Kansas City Pump Co. v. 63

W.

Wabash R. R. Co., American Silver Mfg. Co. v. 184
Wabash R. R. Co., Wright v. 446
Walmsley v. Stowell et. al. 67
Wallace v. Prudential Ins. Co. of America 110
Weidner, Ruby Trust Co. v. 692
Welsh, Gilfillan et. al. v. 1
Western Union Telegraph Co., Jackson v. 70
Western Union Telegraph Co., Kerns & Lorton v. 435
Westminster Laundry Co. v. Hesse Envelope Co. 238
Whitelock et. al. v. Beach 428
Winfrey v. Matthews 713
Wright v. Wabash R. R. Co. 446

Y.

Yontz v. Mo. Pac. Ry. Co. 482

Digitized by Google

CASES CITED.

A.

Ackerman v. Green, 107 Mo. App. 341 313
Ackerman v. Green, 201 Mo. 231 313
Adolff v. Baking Co., 100 Mo. App. 209 588
Allen v. Railroad, 169 Mo. App. 498 378
Anderson v. Railroad, 93 Mo. App. 677 552
Anderson v. St. L. I. M. etc. R. Co., 129 Mo. App. 384- 237
Andrus v. Fidelity Mutual Life Ins. Assn., 168 Mo. 151 296
Ash v. Independence, 79 Mo. App. 74 402
Asphalt Paving Co. v. Ullman, 137 Mo. 543 407
Austin v. State, 10 Mo. 591 472

B.

Baer v. Pfaff, 44 Mo. App. 35 210
Baker v. Stonebrakers, Admr., 36 Mo. 345 329
Bailey v. Emmerson, 87 Mo. App. 220 85
Bane v. Irwin, 172 Mo. 307 104
Bank v. Outhwaite, 50 Mo. App. 130 560
Bank v. Milling Co., 163 Mo. App. 135 434
Bank v. Smith, 107 Mo. App. 178 434
Barnham v. Shelton, 221 Mo. 66 501
Barr v. City, 105 Mo. 557 730
Baxter v. St. Louis Transit Co., 103 Mo. App. 597 49
Beans v. County Court, 33 Mo. App. 635 473
Beck v. Obert, 54 Mo. App. 240 632
Beier v. Transit Co., 197 Mo. 215 137
Bell v. Kaiser, 50 Mo. 150 219
Bell v. Ins. Co., 166 Mo. App. 390 390
Benton v. City of St. Louis, 248 Mo. 98 92
Berger Mfg. Co. v. Lloyd, 113 Mo. App. 205 34
Besshears v. Rowe, 46 Mo. 501 710
Bien v. Transit Co., 108 Mo. App. 399 104
Black v. Brittain, 116 Mo. App. 386 214
Blair v. C. & A. Ry. Co., 89 Mo. 383 322
Blanke v. St. L. S. G. & S. Mining Co., 35 Mo. App. 186 314
Block Queensware Co. v. Smith-Saxton & Co., 107 Mo. App. 13 378
Blockwell v. Ins. Co., 80 Mo. App. 75 44
Bluedorn v. Railway Co., 108 Mo. 448 108
Bohling v. McFarland, 38 Mo. 465 489
Borgraefe v. Supreme Lodge K. & L. of H., 22 Mo. App. 127 269
Bowen v. Ins. Co., 69 Mo. App. 272 688
Bowen v. Railway Co., 95 Mo. 268 62
Brower v. Supreme Lodge, 87 Mo. App. 614 647
Boyd v. Wabash Ry. Co., 105 Mo. 371 135
Boyd v. Railroad, 236 Mo. 54 22
Boyce v. Royal Circle, 99 Mo. App. 349 269
Brand v. Roy, 156 Mo. App. 360 565
Brands v. St. Louis Car Co., 213 Mo. 707 147
Brinson-Judd Grain Co. v. Becker, 76 Mo. App. 379 85
Brinton v. Thomas, 138 Mo. App. 64 525
Brock v. Cox, 38 Mo. App. 40 566
Brown v. Brown, 124 Mo. 79 234

Digitized by Google

Brown v. Railway, 89 Mo. App. 192 ... 581
Brown v. Railroad, 127 Mo. App. 614 ... 726
Brown v. Railroad, 137 Mo. 529 ... 450
Brown v. Weldon, 27 Mo. App. 251 ... 723
Brownlow v. Wollard, 61 Mo. App. 124 ... 430
Browing v. Railway Co., 124 Mo. 70 ... 108
Bruckner, etc. Co. v. Klein, 100 Mo. App. 289 ... 66
Bruns v. Braun, 35 Mo. App. 337 ... 419
Buckner v. Horse & Mule Co., 221 Mo. 710 ... 145
Buddy v. W. St. L. & P. Ry. Co., 20 Mo. App. 206 ... 403
Burge v. Railroad, 244 Mo. 76 ... 136
Burgess v. Mercantile Ins. Co., 114 Mo. App. 169 ... 679
Burkard v. Rope Co., 217 Mo. 481 ... 103- 147
Burke v. Grand Lodge A. O. U. W., 136 Mo. App. 450 ... 269
Burkharth v. Stevens, 117 Mo. App. 425 ... 471
Burkharth v. Stevens, 84 Mo. App. 531 ... 472
Burney v. Railroad, 126 Mo. 372 ... 670
Bushnell v. Railroad, 118 Mo. App. 618 ... 552

C.

Campbell v. Dent, 54 Mo. 325 ... 560
Carolus v. Koch, 72 Mo. 645 ... 611
Carter v. Baldwin, 107 Mo. App. 217 ... 490
Carr v. Pac. Mutual Life Ins. Co., 100 Mo. App. 602 ... 349
Casler v. Chase, 160 Mo. 418 ... 465
Casey v. St. Louis Transit Co., 116 Mo. App. 235 ... 19
Central Natl. Bank v. Cooper, 85 Mo. App. 383 ... 520
Chick v. Frey Coal Co., 78 Mo. App. 234 ... 695
Chrisman v. Divinia, 141 Mo. 122 ... 466
Christian v. Smith, 85 Mo. App. 117 ... 558
Chlanda v. Transit Co., 213 Mo. 244 ... 379
Chandler v. Gas Co., 174 Mo. 329 ... 92
City of Bacon, 144 Mo. App. 477 ... 401
City of Fisher, 60 Mo. App. 511 ... 558
City of Marshall to use of v. Wisdom, 127 Mo. App. 460 ... 404
City of Sedalia v. Montgomery, 109 Mo. App. 197 ... 624
Citizens Bank v. Lowder, 141 Mo. App. 603 ... 66
Clark v. Railroad, 138 Mo. App. 424 ... 412
Clark v. Huffaker, 26 Mo. 264 ... 560
Cobb v. St. L. & H. Ry. Co., 149 Mo. 609 ... 325
Cochran v. Thomas, 131 Mo. 275 ... 85- 465
Coen v. Lounge Co., 222 Mo. 514 ... 148
Cole v. Barron, 8 Mo. App. 509 ... 416
Cole v. Fitzgerald, 132 Mo. App. 17 ... 568
Cole v. Jones, 159 Mo. App. 472 ... 147
Cole v. Transit Co., 183 Mo. 81 ... 147
Coleman v. Cole, 158 Mo. 253 ... 515
Collier v. C. & A. R. R. Co., 48 Mo. App. 398 ... 232
Collier v. Catherine Lead Co., 208 Mo. 246 ... 258
Combs v. Construction Co., 205 Mo. 367 ... 62
Construction Co. v. Jones, 60 Mo. App. 1 ... 66
Construction Co. v. Coal Co., 205 Mo. 74 ... 407
Cooper v. St. Louis M. Etc. R. Co., 123 Mo. App. 141 ... 232
Cooper v. Hunt, 103 Mo. App. 9 ... 471- 478
Coulter v. Construction Co., 131 Mo. App. 230 ... 401
Cowell v. Roberts, 79 Mo. 218 ... 568
Crohn v. Ins. Co., 170 Mo. App. 273 ... 390
Cross v. Railroad, 77 Mo. 318 ... 450
Crews v. Lachland, 67 Mo. 619 ... 559
Curd v. Brown, 148 Mo. 82 ... 234
Curray v. Lacky, 35 Mo. 389 ... 489
Curtis v. McNair, 173 Mo. 270 ... 147
Cushing v. Powell, 130 Mo. App. 576 ... 431

Digitized by Google

D.

Darlington Lumber Co. v. Harris, 107 Mo. App. 148 425
Darlington Lumber Co. v. Pottenger, 165 Mo. App. 442 67
Darlington Lumber Co. v. Smith Bldg. Co., 134 Mo. App. 316.... 416
Deal v. St. L. I. M. etc. R. Co., 144 Mo. App. 684 237
Dean v. Railroad, 199 Mo. 408 ..... 92- 145
Decker v. Railroad, 149 Mo. App. 534 552
Delo v. Old Dominion Mining Co., 160 Mo. App. 38 147
Dey v. United Rys. Co., 140 Mo. App. 461 135
Dickerson v. Bridges, 147 Mo. 235 16
Dillard v. McClure, 64 Mo. App. 488 490
Donaldson v. Butler Co., 98 Mo. 163 490
Dodd v. Guiseffe, 100 Mo. App. 311 663
Dolan v. Ins. Co., 88 Mo. App. 666 688
Donovan etc. v. Griffith, 215 Mo. 149 234
Donnell v. Wright, 147 Mo. 639 ..... 368- 609
Donner v. Railway, 133 Mo. App. 535 452
Douglass v. Stephens, 18 Mo. 362 438
Drey v. Doyle, 99 Mo. 459 571
Drey & Kahn Glass Co. v. Mo. Pac. R. Co., 156 Mo. App. 178... 196
Driskell v. U. S. H. & A. Ins. Co., 117 Mo. App. 362 357
Dulaney v. Sugar Refining Co., 42 Mo. App. 662 663
Dutcher v. Hill, 29 Mo. 271 642

E.

Eau Claire St. L. Lbr. Co. v. Gray, 81 Mo. App. 337 67
Ecton v. Railway, 125 Mo. App. 223 412
Ellis v. Met. St. Ry. Co., 234 Mo. 657 136
Ely v. St. Louis, 181 Mo. 729 729
Ely Walker v. Mansur, 87 Mo. App. 113 53
Emmert v. Aldridge, 231 Mo. 124 368
English v. Rand Shoe Co., 145 Mo. App. 438 104
Enson v. Smith, 57 Mo. App. 584 378
Everett v. Butler, 192 Mo. 564 501

F.

Fanning v. Doan, 146 Mo. 98 369
Faulker v. Bridget, 110 Mo. App. 377 66
Feeney v. Railroad, 123 Mo. App. 420 581
Ferguson v. Dalton, 158 Mo. 323 714
Ferguson's In re, 206 Mo. 203 212
Fetter v. Fidelity & C. Co., 174 Mo. 256 344
Fiedler v. Bambrick Const. Co., 162 Mo. App. 526 312
Fink v. Ins. Co., 60 Mo. App. 673 678
Fitch v. Tel. Co., 150 Mo. App. 149 440
Fitzpatrick v. Weber, 168 Mo. 572 85
Fogarty v. Transfer Co., 180 Mo. 490 104
Fontaine v. Bank, 57 Mo. 552 15
Forbes v. Dunnavant, 198 Mo. 193 62
Foundry v. Railroad, 130 Mo. App. 117 453
Francis v. A. O. U. W., 150 Mo. App. 347 680
Francis v. Railroad, 118 Mo. App. 435 726
Freeman v. Moffitt, 119 Mo. 280 571
Fry v. Fry, 119 Mo. App. 476 568
Fuchs v. City of St. Louis, 167 Mo. 646 92
Fugate v. Pierce, 49 Mo. 441 234
Fulton v. Sims, 127 Mo. App. 677 510

G.

Gaines & Co. v. Grocery Co., 107 Mo. App. 532 85
Gale v. Mill Co., 159 Mo. App. 639 63

Digitized by Google

Gallagher v. Tipton, 133 Mo. App. 557 ... 729
Gallop v. Royal Neighbors, 167 Mo. App. 85 ... 390
Gannon v. Laclede Gas Light Co., 145 Mo. 502 ... 139
Gaus v. Railroad, 113 Mo. 308 ... 454
Garnett & Allen Paper Co., v. Midland Publ. Co., 156 Mo. App 187 ... 295
Garesche v. MacDonald, 103 Mo. 1 ... 633
Garver v. Garver, 145 Mo. App. 353 ... 717
Gates v. Watson, 54 Mo. 585 ... 559
George v. Railroad, 225 Mo. 364 ... 147
George v. Mfg. Co., 159 Mo. 333 ... 93
Gibler v. Terminal R. R. Assn., 203 Mo. 208 ... 325
Gibney v. St. Louis Transit Co., 204 Mo. 704 ... 325
Gilbert Book Co. v. Sheridan, 114 Mo. App. 332 ... 492
Gilbert v. Railroad, 132 Mo. App. 534 ... 552
Gill v. Safe Co., 170 Mo. App. 485 ... 533
Girls' Industrial Home v. Fritckey, 10 Mo. App. 344 ... 210
Glaser v. Rothschild, 221 Mo. 212 ... 158
Goffe v. Gibson, 18 Mo. 1 ... 221
Goodman v. Railroad, 45 Mo. 33 ... 494
Goodson v. Embleton, 106 Mo. App. 77 ... 221
Gorman v. Railroad, 26 Mo. 441 ... 726
Greer v. Major, 114 Mo. 145 ... 611
Griswald v. Haas, 145 Mo. 578 ... 558
Grocers v. Journal Co. v. Midland Publ. Co., 127 Mo. 127 Mo. App. 356 ... 242
Guaranty Interior Fix. Co. v. Baseball Co., 152 Mo. App. 601 ... 117

H

Haase & Sons Fish Co. v. Merchants D. T. Co., 143 Mo. App. 421 ... 295
Hake v. Railroad, 83 Mo. 361 ... 104
Harding v. Bedell, 202 Mo. 625 ... 501
Harriman v. Stowe, 57 Mo. 93 ... 234
Harris v. Railroad, 146 Mo. App. 524 ... 145
Hartford Fire Ins. Co. v. Railway, 74 Mo. App. 106 ... 545
Hartung et. al. v. Northwestern Mut. L. Ins. Co., 129 Mo.App. 256 ... 291
Havens v. Fire Ins. Co., 123 Mo. 403 ... 497
Hayden v. Parsons, 70 Mo. App. 493 ... 525
Hawk v. Lumber Co., 166 Mo. 129 ... 106
Hawkins v. Railroad, 135 Mo. App. 524 ... 136
Hays v. City, 159 Mo. App. 431 ... 729
Heinz v. United Rys. Co., 143 Mo. App. 38 ... 247
Heitz v. City of St. Louis, 110 Mo. 626 ... 461
Herriford v. Herriford, 169 Mo. App. 641 ... 716
Hilgert v. Barber, 107 Mo. App. 388 ... 402
Hill Bros. v. Bank, 100 Mo. App. 230 ... 696
Hill v. Railroad, 49 Mo. App. 520 ... 726
Hill v. Sturgeon, 28 Mo. 323 ... 484
Hill v. Taylor, 99 Mo. App. 524 ... 500
Hinkle v. Hinkle, 204 Mo. 208 ... 717
Hollweg v. Bell Tel. Co., 195 Mo. 157 ... 106
Hollaran v. Iron & Foundry Co., 133 Mo. 470 ... 148
Holtzen v. Mo. Pac. Ry. Co., 159 Mo. App. 370 ... 344
Holton v. Towner, 81 Mo. 367 ... 465
Hooper v. Standard L. & A. Ins. Co. ... 351
House Wrecking Co. v. Soken, 152 Mo. App. 458 ... 430
Howland v. C. R. I. & P. Ry. Co., 134 Mo. 474 ... 294
Hughes v. Western Tel. Co., 79 Mo. App. 133 ... 76
Hughes v. Railroad, 127 Mo. 452 ... 82- 156
Hunt v. St. L. I. M. etc. Co., 126 Mo. App. 261 ... 231
Hunt v. Searcy, 167 Mo. 158 ... 647
Hurd v. Rackliffe, 192 Mo. 325 ... 402

Digitized by Google

I.

Insurance Co. v. Railway, 74 Mo. App. 112 ... 546
Irmer v. Brewing Co., 69 Mo. App. 17 ... 109
Iron Mountain Bank v. Armstrong, 92 Mo. 265 ... 378

J.

Jaicks v. Middlesex Inv. Co., 201 Mo. 111 ... 404
Jaicks v. Sullivan, 128 Mo. 177 ... 15
Jewel v. Bolt & Nut Co., 231 Mo. 186 ... 147
Johnson Brinkman Co. v. Central Bank, 116 Mo. 558 ... 433
Johnson v. Machine Co., 144 Mo. App. 436 ... 520
Johnston v. Railroad, 150 Mo. App. 323 ... 82- 151
Jones v. Steele, 36 Mo. 324 ... 466
Jones v. Rush, 156 Mo. 364 ... 431

K.

Kansas City, etc. Co. v. McDonald, 118 Mo. App. 471 ... 491
Kansas City, etc. Co. v. Smith, 36 Mo. App. 608 ... 696
Keeney v. McVey, 206 Mo. 42 ... 212
Kellogg v. Kirksville, 132 Mo. App. 519 ... 467
Kellogg v. Kirksville, 149 Mo. App. 1 ... 467
Keller v. Ins. Co., 198 Mo. 440 ... 44
Kelley v. Benas, 217 Mo. 1 ... 670
Kennedy v. Gas Light Co., 215 Mo. App. 688 ... 62
Kerns & Lorton v. Western Union Tel. Co., 170 Mo. App. 642 ... 439
Kern v. South St. L. Mut. Ins. Co., 40 Mo. 19 ... 295
Kilcullen v. Ins. Co., 108 Mo. App. 61 ... 390
Kirksville v. Coleman, 103 Mo. App. 215 ... 401
Kirkpatrick v. Met. St. Ry. Co., 129 Mo. App. 524 ... 323
Kingsland v. Drum, 80 Mo. 646 ... 492
Knaup, In re, 144 Mo. 653 ... 313
Kochitzky v. Herbst, 160 Mo. App. 443 ... 479
Koons v. Car Co., 203 Mo. 227 ... 430
Kostuba v. Miller, 137 Mo. 173 ... 85
Kreis v. Railroad, 131 Mo. 533 ... 379
Kurtz v. Eisenstein, 123 Mo. App. 388 ... 465
Kurz v. Turley, 54 Mo. App. 237 ... 460
Kuenzel v. Stevens, 155 Mo. 280 ... 378

L.

Lackland v. Railroad, 31 Mo. 180 ... 450
Land Co. v. Railroad, 123 Mo. App. 408 ... 548
Land & Lumber Co. v. Bippus, 200 Mo. 688 ... 14
Lane v. Cunningham, 171 Mo. App. 17 ... 219
Lange v. Railroad, 208 Mo. 477 ... 82- 151
Lanitz v. Keng, 93 Mo. 513 ... 430
Latson v. Transit Co., 192 Mo. 449 ... 137
Laven v. Grand Lodge A. O. U. W., 104 Mo. App. 1 ... 269
Lawrence v. Bailey, 84 Mo. 107 ... 566
Lay v. Railroad, 157 Mo. App. 467 ... 552
Lee v. Knapp & Co., 137 Mo. 385 ... 378
Lee v. Western Union Tel. Co., 51 Mo. App. 375 ... 325
Lewis v. Castello, 17 Mo. 593 ... 209
Lillard v. Wilson, 178 Mo. 145 ... 525
Litton v. Railroad, 111 Mo. App. 140 ... 726
Lord & Bushnell Co. v. Railroad, 155 Mo. App. 175 ... 117
Lumber Co. v. Zietinger, 45 Mo. App. 114 ... 16

Mc.

McCarty et. al. v. W. U. Tel. Co., 116 Mo. App. 441 ... 78
McCrary v. Railway, 109 Mo. App. 567 ... 412

Digitized by Google

McCollum v. Ins. Co., 61 Mo. App. 352 680
McFall v. Railroad, 117 Mo. App. 477 554
McFarland v. Accident Ass'n., 124 Mo. 204 383
McGee v. Railroad, 214 Mo. 530 ..... 136- 663
McGowan v. Railway Co., 61 Mo. 528 61
McGrath v. Railway Co., 197 Mo. 105 484
McGraw v. O'Neill, 123 Mo. App. 691 379
McIntyre v. Tebbets, 140 Mo. App. 116 104
McMahon v. Maccabees, 151 Mo. 522 271
McMorrow v. Dowell, 116 Mo. App. 289 568
McMurray v. Railroad, 225 Mo. 272 147
McReynolds v. Railroad, 110 Mo. 488 468
McWilliams v. Burns, 115 Mo. App. 12 460

M.

Madden v. Railway Co., 167 Mo. App. 143 61
Markowitz v. Kansas City, 125 Mo. 490 547
Markowitz v. Railroad, 186 Mo. 350 136
Martin v. Jones, 72 Mo. 23 571
Matthews v. Railway, 26 Mo. App. 89 663
Matthews v. Railway, 142 Mo. 655 548
Mead v. Maberry, 62 Mo. App. 557 492
Meadows v. Life Ins. Co., 129 Mo. 97 ..... 82- 151
Meily v. Railroad, 215 Mo. 589 151
Melson v. Western Union, 72 Mo. App. 111 440
Merryman v. Buddecke, 243 Mo. 205 430
Merritt Creamer Cy Co. v. Railroad, 128 Mo. App. 420 483
Miller v. McCaleb, 208 Mo. 574 85
Milling Co. v. Transit Co., 122 Mo. 275 412
Moon v. Transit Co., 237 Mo. 435 50
Moore, Admr. v. Mo. Pac. Ry. Co., 164 Mo. App. 34 344
Moore v. Railroad, 85 Mo. 588 103
Moore v. G. & S. Mfg. Co., 113 Mo. 98 623
Moiley v. Railroad, 215 Mo. 589 82
Morris v. Grand Ave. Ry. Co., 144 Mo. 500 325
Moss Tie Co. v. Kuilich, 80 Mo. App. 304 85
Muir v. Railroad, 168 Mo. App. 542 552
Murray v. Mo. Pac. Ry. Co., 101 Mo. 236 328
Murphy v. Wilson, 84 Mo. App. 178 313

N.

Nagle v. Gas Co., 169 Mo. App. 243 93
Natl. Waterworks v. School District of K. C., 23 Mo. App. 227 .. 508
Nelson v. Kansas City, 170 Mo. App. 546 729
Newton Grain Co. v. Pierce, 106 Mo. App. 200 696
Newlin v. Railway Co., 222 Mo. 375 484
Noland v. Barrett, 122 Mo. 181 259
Northup v. Ins. Co., 47 Mo. 435 431
Nugent v. Milling Co., 131 Mo. 241 93

O.

O'Day v. Meadows, 194 Mo. 588 610
Oakes v. St. Louis Candy Co., 146 Mo. 391 242
Orcutt v. Building Co., 201 Mo. 424 484
Osterly v. Railroad, 64 Mo. 421 670
Owens v. Railroad, 95 Mo. 181 ..... 82- 151
Oyler v. Railroad, 113 Mo. App. 375 726
Oyler v. Renfro, 86 Mo. App. 321 492

P.

Padget v. Smith, 206 Mo. 313 465
Page v. Bettes, 17 Mo. 375 417

Digitized by Google

Partello v. Railroad, 217 Mo. 645 ... 379
Parker v. Britton, 133 Mo. App. 274 ... 378
Parker-Washington Co. v. Kemper Ins. Co., 143 Mo. App. 244 ... 14
Parkinson v. Meredith, 158 Mo. 457 ... 14
Patterson v. Ins. Co., 164 Mo. App. 157 ... 38
Paving Co. v. O'Brien, 128 Mo. App. 267 ... 401
Peck v. Ritchey, 66 Mo. 114 ... 560
Peltier v. City of St. Louis, 237 Mo. 686 ... 327
Penningroth v. Penningroth, 71 Mo. App. 438 ... 541
Penter v. Roberts, 51 Mo. App. 222 ... 566
Perry v. Strawbridge, 209 Mo. 621 ... 212
Petring v. Current River Land & Cattle Co., 111 Mo. App. 373 ... 180
Phelan v. Paving Co., 227 Mo. 708 ... 581
Phillips v. Hardenburg, 181 Mo. 472 ... 708
Phoenix Stone etc. Co. v. Huggins, 136 Mo. App. 209 ... 501
Pile v. Holloway, 129 Mo. App. 593 ... 494
Pomeroy v. Fullerton, 113 Mo. 440 ... 295
Porter v. N. M. R. R. Co., 33 Mo. 128 ... 452
Potts v. W. St. L. & P. Ry. Co., 17 Mo. App. 394 ... 483
Press Brick Co. v. School District, 79 Mo. App. 665 ... 35
Prive v. Evans, 49 Mo. 396 ... 379
Price v. Railway Co., 72 Mo. 414 ... 484
Priestly v. Johnson, 62 Mo. 632 ... 494
Prog. Brick Co. v. Gratiot Brick Co., 151 Mo. 501 ... 493

R

Radtke v. St. L. B. & B. Co., 229 Mo. 129 ... 247
Radtke v. B. & B. Co., 229 Mo. 23 ... 104
Railway v. Clark, 121 Mo. 185 ... 547
Railway v. Kansas City, 29 Mo. App. 96 ... 460
Ranney v. St. L. & S. F. R. Co., 137 Mo. App. 537 ... 232
Reach Co. v. Simmons Hdwe. Co., 155 Mo. App. 412 ... 243
Read v. Railway Co., 60 Mo. 109 ... 483
Reed v. Western Union Telegraph Co., 135 Mo. 661 ... 76
Reed v. Railroad, 112 Mo. App. 575 ... 726
Reedy v. Brewing Assn., 161 Mo. 523 ... 638
Rees v. McDaniel, 131 Mo. 681 ... 369
Reilly v. Cullen, 101 Mo. App. 32 ... 81
Reynolds v. Tel. Co., 81 Mo. App. 223 ... 438
Rhodus v. Life Ins. Co., 156 Mo. App. 281 ... 390
Rice v. McCluer, 74 Mo. App. 383 ... 713
Rider v. Culp, 68 Mo. App. 527 ... 714
Riegel v. Loose-Wiles Biscuit Co., 169 Mo. App. 513 ... 151
Rigsby v. Oil Well Supply Co., 115 Mo. App. 314 ... 106
Rigby v. St. L. Transit Co., 153 Mo. App. 330 ... 379
Rissler v. St. L. Transit Co., 113 Mo. App. 210 ... 135
Roberts v. Tel. Co., 166 Mo. 378 ... 588
Robertson v. Robertson, 137 Mo. App. 93 ... 541
Robinson v. Levy, 217 Mo. 498 ... 489
Roenfeldt v. St. L. Sub. Ry. Co., 180 Mo. 554 ... 135
Rogers & Baldwin Hdwe Co. v. Cleveland Bldg. Co., 132 Mo. 442 ... 259
Rose v. Rose, 129 Mo. App. 175 ... 717
Ross v. Railroad, 141 Mo. 390 ... 500
Rude v. City, 93 Mo. 408 ... 450
Rude v. City, 93 Mo. 414 ... 454
Russ v. Railroad, 112 Mo. 45 ... 104
Rushenburg v. Railroad, 109 Mo. 112 ... 670

S.

St. Llous Piano Mfg. Co. v. Merkel, 1 Mo. App. 305 ... 305
St. Joseph v. Baker, 86 Mo. App. 310 ... 16
Sachner Bros. v. Express Co., 72 Mo. App. 13 ... 484
Scarritt v. Jackson County, 89 Mo. App. 585 ... 473
Scrutchfield v. Sauter, 119 Mo. 615 ... 234

Digitized by Google

Schmidt v. Railway, 191 Mo. 215 ... 55
Schmidt v. Transit Co., 115 Mo. App. 445 ... 660
School District v. Lauderbaugh, 80 Mo. 190 ... 598
Seaboard Natl. Bank v. Woesten, 176 Mo. 59 ... 407
Shaffer v. Detie, 191 Mo. 387 ... 85
Shelley v. Sperry, 121 Mo. App. 429 ... 244
Shinn v. United Rys. Co., 146 Mo. App. 718 ... 247
Smith v. Banks, 120 Mo. App. 527 ... 434
Smith v. Barrett, 41 Mo. App. 460 ... 180
Smith v. Box Co., 193 Mo. 715 ... 93
Smith v. City of St. Joseph, 55 Mo. 456 ... 322
Smith v. C. & A. R. Co., 108 Mo. 243 ... 325
Smith v. Railroad, 127 Mo. App. 160 ... 726
Smith v. Railroad, 92 Mo. 359 ... 104
Smith v. Sedalia, 182 Mo. 12 ... 467
Smith v. Sedalia, 244 Mo. 107 ... 467
Smith v. Wabash R. R. Co., 129 Mo. App. 413 ... 702
Smith v. Woodmen of the World, 179 Mo. 119 ... 269
Smoot v. Kansas City, 194 Mo. 513 ... 247
Smoot v. Judd, 161 Mo. 673 ... 520
Sommer v. Boyson, 168 Mo. App. 335 ... 713
Sparks v. Dispatch Transfer Co., 104 Mo. 531 ... 623
Spencer v. Railway, 120 Mo. 154 ... 454
Spohn v. Mo. Pac. Ry. Co., 87 Mo. 74 ... 379
Spratt v. Early, 199 Mo. 501 ... 368-609
Starr v. Bartz, 219 Mo. 47 ... 571
Stegman v. Gerber, 146 Mo. App. 104 ... 93
Stephens v. Railroad, 86 Mo. 221 ... 104
Stephens v. Lumber Co., 110 Mo. App. 398 ... 61
Stephenson v. Railroad, 68 Mo. App. 642 ... 454
Stevens v. Stevens, 170 Mo. App. 322 ... 717
Stewart v. Grain Co., 163 Mo. App. 486 ... 85
State v. Addington, 12 Mo. App. 214 ... 160
State v. Baker, 71 Mo. 475 ... 171
State v. Bockstruck, 136 Mo. 335 ... 160-164-170
State v. County Court, 45 Mo. App. 394 ... 478
State v. Couthorn, 40 Mo. App. 74 ... 478
State v. Cummings, 248 Mo. 509 ... 162-170
State v. Edgen, 181 Mo. 582 ... 162-171
State v. Evans, 83 Mo. 319 ... 472
State v. Franklin, 133 Mo. App. 486 ... 461
State v. Feitz, 154 Mo. App. 578 ... 458
State v. Hall, 130 Mo. App. 174 ... 160
State v. Hyde, 234 Mo. 200 ... 344
State v. Hilton, 248 Mo. 522 ... 161-164-171
State v. Kooch, 202 Mo. 223 ... 159
State v. McMahon, 234 Mo. 611 ... 159
State v. McCance, 110 Mo. 398 ... 171
State v. Murray, 126 Mo. 526 ... 500
State v. Timens, 232 Mo. 177 ... 160
State v. Wilkerson, 170 Mo. 184 ... 162-171
State ex inf. v. Henderson, 145 Mo. 329 ... 509
State ex rel. v. Railroad, 206 Mo. 251 ... 451
State ex rel. v. Buhler, 90 Mo. 568 ... 460
State ex rel. v. Schweickardt, 109 Mo. 496 ... 460
State ex rel. v. Canty, 207 Mo. 439 ... 461
State ex rel. v. Lamb, 237 Mo. 439 ... 461
State ex rel. v. Higgins, 84 Mo. App. 531 ... 471
State ex rel. v. Hiege, 37 Mo. App. 338 ... 471
State ex rel. v. Fort, 107 Mo. App. 328 ... 472
State ex rel. v. McCannon, 111 Mo. App. 585 ... 473
State ex rel. v. Packett, 136 Mo. App. 700 ... 473
State ex rel. v. Turner, 210 Mo. 77 ... 473

Digitized by Google

State ex rel. v. Patterson, 207 Mo. 144 ... 158
State ex rel. v. Direkx, 211 Mo. 568 ... 180
State ex rel. v. Innes, 137 Mo. App. 420 ... 259
State ex rel. v. Barclay, 85 Mo. 55 ... 313
State ex rel. v. Fort, 180 Mo. 108 ... 370
State ex rel. v. Lubke, 85 Mo. 338 ... 370
State ex rel. v. Buhler, 90 Mo. 560 ... 370
State ex rel. v. County Court, 109 Mo. 248 ... 370
State ex rel. v. Smith, 105 Mo. 6 ... 370
State ex rel. v. Railroad, 77 Mo. 143 ... 371
State ex rel. v. Police Commissioners, 80 Mo. App. 206 ... 371
State ex rel. v. Field, 37 Mo. App. 83 ... 371
State ex rel. v. Bridge Co., 206 Mo. 74 ... 593
State ex rel. v. K. C. etc. R. R. Co., 77 Mo. 143 ... 594
State ex rel. v. Baggott, 96 Mo. 63 ... 598
State ex rel. v. Davis, 54 Mo. App. 450 ... 598
State ex rel. v. Beyers, 41 Mo. App. 503 ... 600
State ex rel. v. Ranbauer, 40 Mo. 155 ... 601
State ex rel. v. Cole, 220 Mo. 697 ... 509
State ex rel. v. St. L. Court of Appeals, 99 Mo. 216 ... 541
State ex rel. v. Henderson, 86 Mo. App. 482 ... 560
State ex rel. v. Delaney, 122 Mo. App. 239 ... 702
State ex rel. v. Staed, 143 Mo. 248 ... 713
Stine v. Austin, 9 Mo. 558 ... 418
Stotler v. Railroad, 200 Mo. 107 ... 50
Stone v. Troll, 134 Mo. App. 308 ... 525
Stone v. Travelers Ins. Co., 78 Mo. 655 ... 294
Strother v. McMullen Lbr. Co., 200 Mo. 647 ... 433
Stump v. Hornback, 109 Mo. 272 ... 369
Sullivan v. Ins. Co., 89 Mo. App. 106 ... 43
Summers v. Ins. Co., 45 Mo. App. 46 ... 678
Swenson v. City, 69 Mo. 157 ... 450

T.

Tate v. Railway, 64 Mo. 158 ... 452
Tabler v. Railroad, 93 Mo. 79 ... 104
Taylor v. Grand Ave Ry. Co., 185 Mo. 239 ... 344
Taylor v. Buzzard, 114 Mo. App. 622 ... 515
Tetwiler v. Railroad, 242 Mo. 194 ... 484
Theobald v. Transit Co., 191 Mo. 396 ... 136
Thompson v. Railroad, 136 Mo. App. 407 ... 554
Thomas v. Metropolitan St. R. Co., 125 Mo. App. 131 ... 344
Tinkle v. St. L. & S. F. R. Co., 212 Mo. 245 ... 247
Tower Bros. v. Hamilton, 179 Mo. 205 ... 520
Trenton v. Collier, 68 Mo. App. 483 ... 400
Troll v. Protected Home Circle, 161 Mo. App. 719 ... 383
Turner v. Railroad, 130 Mo. App. 540 ... 467
Turney v. United Rys. Co., 155 Mo. App. 513 ... 50
Tyler v. Parr, 52 Mo. 249 ... 219

U.

Udden v. O'Reilly, 180 Mo. 650 ... 378
Union Brewing Co. v. Ehlhardt, 139 Mo. App. 129 ... 117

V.

Vance v. Corrigan, 78 Mo. 94 ... 14
Vermillion v. Parsons, 98 Mo. App. 72 ... 383
Vencill v. Railroad, 132 Mo. App. 722 ... 554
Vennum v. Mertens, 119 Mo. App. 461 ... 520
Vogelsong v. St. L. W. F. P. Co., 147 Mo. App. 578 ... 309
Vonkey v. St. Louis, 161 Mo. 523 ... 638

Digitized by Google

W.

Walther v. Merrell, 6 Mo. App. 70..... 710
Ward v. Building Co., 248 Mo. 348..... 92
Webster v. Railroad, 116 Mo. 118..... 467
Weissels-Gerhart R. E. Co. v. Epstein, 157 Mo. 101..... 219
Werbick v. Railroad, 131 Mo. App. 52..... 412
Wagaman v. Security etc. L. Ins. Co., 110 Mo. App. 616..... 118
Walters v. United Rys. Co., 165 Mo. App. 628..... 247
White v. Anderson, 164 Mo. App. 132..... 515
White v. Davis, 50 Mo. 333..... 16
Whitsett v. Wamack, 159 Mo. 14..... 571
Wilson v. Fisher, 172 Mo. 10..... 16
Williams v. Husky, 192 Mo. l. c. 550..... 16
Williamson v. M. K. & T. Ry. Co., 115 Mo. App. 72..... 232
Wittig v. Ry. Co., 101 Mo. 631..... 483
Worth v. Ollis, 61 Mo. App. 401..... 560
Woods v. Land, 30 Mo. App. 176..... 525
Wood v. Metropolitan St. Ry. Co., 181 Mo. 433..... 344
Wright v. Mining Co., 163 Mo. App. 536.....82- 151
Wright v. Railroad, 118 Mo. App. 392.....412- 552
Wright v. Trust Co., 144 Mo. App. 640..... 434
Wyeth Hdwe & Mfg. Co. v. Lang & Co., 127 Mo. 242..... 294

Y.

Young v. Evans-Snyder-Buel Com. Co., 158 Mo. 395..... 492
Young v. Iron Co., 103 Mo. 324..... 108
Young v. Kellar, 94 Mo. 581..... 259
Young v. Railroad, 227 Mo. 207..... 22
Young v. Shickle H. & H. Co., 103 Mo. 324..... 109

Z.

Zalotuchin v. Railway, 127 Mo. App. 577..... 49
Zellers v. Light Co., 92 Mo. App. 107..... 62
Zeis v. Brewing Assn., 205 Mo. 649..... 56

Digitized by Google

Digitized by Google

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1913.

(*Continued from Volume 173.*)

R. S. GILFILLAN et al., Respondents, v. J. E. WELSH, Appellant.

Kansas City Court of Appeals, June 30, 1913.

ACCOUNT STATED: Special Contract. In a suit for the balance due on an account for stone sold and delivered, where the suit is upon an account stated, the admission of the plaintiffs, that they agreed that if defendant would give his note for the balance, they would hold it as cash and credit it with any loss accruing to defendant from any defective material they had sold, does not destroy their right to recover as upon an account stated under the circumstances of this case. It is not shown that the stone was sold upon any such condition nor that an agreement as to the amount due was obtained by making any such agreement. And it does appear that the condition upon which the special contract was to rest was not complied with by appellant.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas*, Judge.

AFFIRMED.

Digitized by Google

Clarence S. Palmer for appellant.

Geo. W. Morris and *W. W. Calvin* for respondents.

TRIMBLE, J.—Appellant was sued by respondents for $756 upon an account stated for stone sold and delivered to appellant and used in paving a portion of West Eighth street in Kansas City, Missouri. The answer denied that it was ever agreed and determined that defendant remained indebted to plaintiff on account of said stone in the sum of $756 or in any other amount but alleged that the stone was fully paid for and that defendant held a receipt in full therefor. At the trial, appellant contended that he agreed to pay $1.75 per square yard for the stone instead of $1.90 as claimed by respondents and that this difference in the cost made the difference of $756 sued for. But it was clearly shown in evidence the respondents sold appellant the stone at $1.90 per square yard and that appellant paid respondents in cash the sum of $6969.50 leaving a balance due of $756, and that this balance was settled upon and agreed to by the parties. The jury found for respondents in the sum of $756, consequently their finding was against appellant's contention that the stone was sold at $1.70, and was a finding that appellant had not paid said account in full as claimed in his answer.

It seems that, in his paving contract with the city, appellant was required to give a ten year guaranty that he would keep the pavement in repair. The stone furnished by respondents to pave the street was a new and untried kind of stone, and, when appellant went to settle with respondents for the stone, he suggested that they give him a bond that the stone would last as they had said it would and thus save appellant from loss in case he was required at any time within ten years to repair on account of defective material. This

Digitized by Google

was not mentioned until after the stone had been sold and delivered and the parties were engaged in settling for the same. Respondents refused to give a bond, but, when appellant paid them in cash all except $756, they agreed that if appellant would give them his note for $756 they would hold it in lieu of the balance due on the account, and whatever stone appellant would have to replace under his guaranty, respondents would credit on said note. So that said note would in this way act as a sort of security to appellant that the untried stone would last as represented. As shown above, however, this was not set up in the answer, but the claim was made that the stone was bought at a less price than $1.90 a square yard and that at said less price the stone was fully paid for. Respondents admitted in their testimony that, when they went to figure the amount due on the account, appellant mentioned the matter of bond to them and that they refused to give a bond but did agree, as to the balance of $756 determined upon as due, that, if appellant would give them his note therefor, they would hold the same under the arrangement above mentioned.

It is the contention of appellant that, in-as-much as respondents admitted that when the balance of $756 was agreed upon they consented to accept a note for the same which they were to hold in lieu of cash as a sort of security to appellant during his ten years of guaranty, this created a special contract governing the terms of payment of the balance due on the contract, and destroyed the implied obligation to pay the balance due on the account raised by the agreement as to such balance. This contention is based on the doctrine that "Where an account is stated and as a part of the transaction there is an express promise to pay upon conditions different from that which otherwise the law would imply from the immediate adjustment of the account, such implied promise is excluded." 1 Cyc. 375. And, although appellant did

Digitized by Google

not raise any such issue in his pleading but claimed that the stone was fully paid for, yet, as respondents admit that they agreed to accept a note which would be held by them in lieu of the cash, therefore, he claims there was no evidence to support the implied promise alleged in the petition and consequently appellant's demurrer should have been sustained.

This contention overlooks two very important things. First, that the stone was sold without any agreement to give a bond or allow a portion of the money due therefor to be held by appellant as security, and that the agreement as to the amount due on the account was not obtained by means of any consent on the part of respondents to allow the balance to be retained and a note given in lieu thereof. Second, that the agreement to accept a note was made on condition that appellant give them his note, and this condition was not complied with. Instead of giving his note according to the terms of the special contract in reference to the payment of the balance due on the account, appellant did not see fit to comply with respondents repeated requests to settle the balance due. And when at last respondents were compelled to sue for said balance, appellant did not set up said special contract but denied the account claiming it was fully paid. When the amount due on the contract was agreed upon, appellant paid all but $756, and it was agreed that this amount was due, but appellant wanted to retain this until it was seen that the stone was as agreed upon. Respondents agreed to this on condition that a note is given, but this condition is not complied with. When the amount due on the account was ascertained and agreed upon, the law implied an agreement to pay same, in the absence of a special agreement to accept a note. Appellant thereupon was required to comply with his part of said special contract by executing and delivering the note, or at least to do so within a reasonable time. He did not do so

Digitized by Google

within that time, but, on the contrary, when sued, defended on the ground that the debt was fully paid. The failure to execute the note within a reasonable time, and thereby call into being the special contract, left the one implied by law in full force and effect. The promise of respondents to accept anything in lieu of the cash due on the account was on the condition that appellant would execute to them his note, and as that condition was never complied with, respondents are discharged from the operation of such promise even if there can be said to be any consideration for such promise. 9 Cyc. 641, 642. Hence, respondent's admission that they did agree to accept a note, if appellant would give it, did not destroy the right to recover nor did show that there was no account stated. The judgment is affirmed. All concur.

CHARLES ADAMS, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 30, 1913.

1. **CARRIERS OF PASSENGERS: Personal Injuries: Pleading: Evidence.** Plaintiff charged that defendant was negligent in failing to latch and securely fasten a door at the exit of its street car platform, on which door was a rod or handhold for use in boarding or alighting from the car. There was evidence that plaintiff was standing on the platform at the exit ready to alight when the car would come to a stand still; that he had hold of the rod on the door and that the door came unfastened and swung outward throwing him to the street. *Held*, that the fact that the door with its handhold did come loose was some evidence of negligence, and that the case was properly one for the jury.

2. **DAMAGES: Verdict of Jury: Excessive Award.** Plaintiff's injury was not permanent. It caused him some pain and dis-

Digitized by Google

comfort. He alleged in his petition that he lost wages of fifteen dollars per week since his injury and incurred an indebtedness of $100 for medical attention. But no proof of either was offered and he said he worked at his job but had to hire some of his duties performed by another. He was porter at a club. No instruction as to damages was given by him and the jury had no guide to assist them in assessing the damages. *Held*, that $2000 was excessive and that $500 should be remitted as $1500 would be a most liberal allowance.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell*, Judge.

AFFIRMED (*conditionally*).

John H. Lucas and *L. T. Dryden* for appellant.

Kimbrell & White for respondent.

TRIMBLE, J.—Plaintiff was a passenger upon defendant's north bound street car proceeding along Main between Twelfth and Eleventh streets, in Kansas City, Missouri. He alleges that he was standing in the rear vestibule and, after notifying the persons in charge that he desired to alight at Eleventh street, went to the edge of the vestibule and stood near the steps leading from the car waiting for it to stop at Eleventh. The door of the car leading from the vestibule to the street was one that folded in the middle, and, when folded, swung, on hinges at the southeast corner of the car, around against the end of the car and was there fastened or held in place by a hook over the door. Across this door, thus folded and in place, was a brass rod or handhold fastened to the door just below the glass therein, which rod was for the use of passengers in boarding, or alighting from, the car. Plaintiff claims that while standing thus at the edge of the platform, waiting for the car to stop, he took hold of this rod; that the catch or fastening, which held the door in its place against the end of the car, gave way allowing the door to swing around toward

Digitized by Google

its place when closed, and plaintiff, having hold of said rod, was suddenly precipitated from the car to the ground, fracturing a bone on the point of his shoulder and otherwise bruising and injuring him.

The petition specified the negligence thus: "That as plaintiff stood in the position aforesaid grasping said handhold, said door through the negligence of defendant in insecurely latching and fastening it became unlatched, unfastened and loosed so that said door swung outward toward the exit and plaintiff was thereby thrown, hurled and permitted to fall to the street, etc."

The answer contained a general denial and a plea of contributory negligence. Defendant introduced testimony tending to show that plaintiff was seated in the car and suddenly jumped up, ran out to the platform, seized the rod in question and swung his body off the car in an attempt to alight while the car was in the middle of the block and going about six miles an hour; that the great weight and swing of his body pulled the door loose from its fastening and it thereupon swung outward causing him to fall.

The jury found a verdict for plaintiff and assessed his damages at $2000.

The two points relied upon by defendant are, first, that plaintiff failed to prove the negligence charged in the petition, and, second, that the verdict is excessive. As to the first point, defendant's position is that the plaintiff does not rely on a statement of general negligence but, having chosen to specify particular negligence, he must prove that negligence or fail in his case. This is no doubt a correct rule. But does it apply to this case, or, if so, is there an entire failure of proof as to the specific negligence charged? Defendant's theory is that the specific allegation of negligence is "in insecurely latching and fastening the door" and that, as there was no testimony given by any witness who says he saw or examined the door and found

Digitized by Google

the latch defective or insecurely fastened, therefore, there is no evidence whatever that it was, through negligence, insecurely latched or fastened. But this overlooks the reasonable and natural inference which the jury are entitled to draw from the facts that are shown. The handhold was put there for the use of passengers in steadying themselves and to assist them in boarding and alighting from the car. Its value as a means of safety lay in its ability to remain in place. If it fails to do this, and comes loose when put to the use for which it is intended, then it ceases to be a help and becomes a trap to catch even the wary and most careful. The very fact that it came loose is some evidence that it was insecurely latched or fastened, and if it was not securely latched or fastened then it was negligence to latch or fasten it in the manner in which that act was done, since the duty of the defendant, as a carrier of passengers, was to fasten it so that it would not come loose when used in the manner for which it was intended. There was evidence that afterwards when it was properly and securely fastened it did not come loose when tested. But, under the test over which this case arises, it did come loose. Consequently this fact is some evidence to show that it must have been insecurely, and therefore negligently, fastened, or it would not have come loose. The case of Blanton v. Dold, 109 Mo. 64, is excellent authority for the position here taken. That case was where the plaintiff was injured by the sudden and unexpected starting of a "blood mill" in a packing house. Plaintiff was not able to furnish affirmative evidence, or rather express positive evidence, of negligence in the construction or operation of the lever by which the mill was put in motion, and it was urged that plaintiff had failed in his proof. But the Supreme Court held otherwise, and on page 74 said:

"But some catastrophes are of a nature such as carry, in a mere statement of their occurrence, an im-

Digitized by Google

plication of some neglect. In such event 'the thing itself speaks,' as some judges have expressed it; often in Latin, though the idea is none the less forcible or clear in our mother tongue. [Byrne v. Boadle (1863), 2 H. & C. (Exch.) 725; Briggs v. Oliver (1866), 4 H. & C. (Exch.) 407.]

"Thus it was held in Mooney v. Lumber Co. (1891), 154 Mass. 407, that the starting, without apparent cause, of the carriage of a sawing machine, when left at rest, with 'the lever locked which was used to start and stop it,' whereby the plaintiff was injured, constituted evidence to support a finding that there was negligence in the construction or condition of the machine with reference to its reasonable safety. [Donahue v. Brown (1891) 154 Mass. 21.

"Many other illustrations might be cited were it necessary. The principle that underlies them is that negligence, like any ultimate fact in issue, may be established as well by reasonable inferences from other facts as by more direct means of proof. [Barnowski v. Helson (1891), 89 Mich. 523.]"

The Blanton case was one between a servant and master where the inference of negligence is harder to draw than in the case before us which involves the care owed to a passenger by a common carrier. There was sufficient proof of negligence to go to the jury. And, of course, the question whether plaintiff was thrown off while standing on the platform, or was attempting to jump from the car while in motion and fell on account of the unusual pull or weight put on the door, was a question for the jury, and not for us, to decide. Whether the door by coming loose, caused plaintiff to fall out from the car, his momentum in doing so pulling the door shut after him, or whether his weight, in voluntarily swinging from the car, jerked the door loose would be difficult to decide even by onlookers and was, therefore, clearly a question for the jury.

Digitized by Google

As to the point that the verdict is excessive there is this to be said: The plaintiff's injury was a fracture or a breaking of the little tip of the shoulder blade. There were no permanent injuries. At the time of the trial the fracture had healed. The plaintiff was not allowed by his physician to use his arm for four or five weeks it being bound to his body to permit the bone to knit. He suffered some pain and discomfort during this time, and was in bed for a week or more, but his physician seemed to think this was because it was more comfortable there rather than because his injuries made it necessary. The petition alleged that he lost earnings to the amount of fifteen dollars per week since the injury and owed $100 for medical attention. But no proof of the amount of such losses or expenses was made and plaintiff himself said that he worked at his job after his fall but had to hire help in mopping the floors. Plaintiff is a colored man, and worked as a porter at a club. As no proof was made of these losses or expense it may be assumed that they were not of serious extent, or proof thereof would have been forthcoming. No instruction on the measure of damages or on any other feature of plaintiff's case was asked or given in plaintiff's behalf. The jury were, therefore, left without guide in determining what elements to take into consideration in fixing the amount of damages. In view of all the circumstances and regarding plaintiff's injury and loss in the light most favorable to him, we think $2000 is excessive. Under the most liberal allowance as compensation for plaintiff's damage his recovery ought not to exceed $1500. If, therefore, within ten days of the announcement of this opinion, plaintiff will enter a remittitur of $500, the judgment will be affirmed, otherwise it will be reversed and remanded for a new trial. So ordered. All concur.

Digitized by Google

BARBER ASPHALT PAVING COMPANY, Appellant, v. ANNIE CAMP FIELD and RICHARD H. FIELD, Respondents.

Kansas City Court of Appeals, October 6, 1913.

1. **TAX BILLS: Jurisdiction: Interest.** In order to confer jurisdiction of the subject-matter on the court in any action to enforce the lien of a special tax bill, the action must have a defendant or defendants who own the land sought to be charged or some interest or estate in it and the judgment can affect only such interest or estate.

2. **———: ———: ———.** An action to enforce the lien of a special tax bill issued under the provisions of the Kansas City Charter is not *in rem* until after jurisdiction of the subject-matter has been acquired by the court in which the action is being prosecuted.

3. **———: Record Owner: Notice.** In a suit to enforce a special tax bill the record owner would be the proper party unless the true owner was known to the holder of the bill. If the owner of the property fails to record his deed, and a tax lien holder brings his action against one who appears to be the owner by the record, not having notice of the title of the real owner, and proceeds to judgment and sale, it will convey the title in a way similar to the instance of one purchasing from the record owner without notice of any other title.

Appeal from Jackson Circuit Court.—*Hon. Thos. J. Seehorn,* Judge.

AFFIRMED.

Scarritt, Scarritt, Jones & Miller for appellant.

Gage, Ladd & Small and *R. H. Field* for respondents.

JOHNSON, J.—This suit was begun in the circuit court of Jackson county, May 29, 1902, on a special tax-bill issued to plaintiff by Kansas City, September 28,

Digitized by Google

1897, for paving Tenth street between Broadway and Summit streets. The taxbill was issued against lot 1, block 6, Coates' addition to Kansas City, and the petition alleged that the defendants, Sarah McLean, Annie Camp Field and Richard H. Field, owned, or claimed to own, the land. Subsequently plaintiff dismissed Sarah McLean from the suit and proceeded against the remaining defendants who are husband and wife. They filed separate answers disclaiming any beneficial interest in the land at the time of the commencement of the suit and the answer of Mrs. Field interposed other defenses but in the view we take of the case we do not find it necessary to refer to them. A jury was waived and the court after hearing the evidence rendered judgment for defendants. An appeal was allowed plaintiff to the Supreme Court on the ground that title to real estate was involved in the action but that court ruled that no such issue was involved and transferred the case to this court.

On May 24, 1895, Sarah McLean, who, at the time, resided in California and was the owner of the lot, entered into a written contract with George H. Camp who lived in Georgia, by the terms of which she sold and agreed to convey the lot by proper warranty deed to the said Camp who was the father of the defendant, Annie Camp Field. This contract was acknowledged by Sarah McLean and was filed for record in the office of the recorder of deeds of Jackson county on May 25, 1895. Camp performed the conditions of the contract and on June 1, 1895, Sarah McLean, at his request, executed and delivered to his daughter, Annie Camp Field, a warranty deed to the lot. This deed was acknowledged and filed for record on the date of its execution but was invalid because of its failure to contain a sufficient description of the lot. Acting in the belief that the deed conveyed to her the fee simple title, Mrs. Field, on September 18, 1895, exe-

Digitized by Google

cuted and delivered to her father a written instrument in which she declared that she held the title to the lot in trust for him. This declaration was not acknowledged or recorded but defendants contend that plaintiff had actual knowledge of its existence. To support this contention evidence was introduced by defendants to the effect that from the date of the purchase of the lot by Mr. Camp to that of the commencement of this suit, the defendant Field, acting as Camp's agent, leased the premises to tenants; that Camp's name appeared in the leases as lessor and that the taxes assessed against the lot were paid by Field as the agent of Camp to whom the tax receipts were issued.

The declaration of trust included other property that the lot in controversy and in March, 1900, was introduced in evidence by defendants in another suit between the same parties then pending in a Federal court over taxbills issued against such other property for a different improvement from that in question. The attorneys who represented plaintiff in that suit were the same as those now appearing for plaintiff and defendants insist that the notice they received of the existence of a declaration of trust affecting lot 1, block 6, Coates' addition to Kansas City, constituted actual notice to plaintiff, their client. On the other hand, one of the attorneys testified that their employment by plaintiff was special and not general and as the present controversy had not arisen at the time of the proceedings in the Federal court, they took no note of a fact wholly irrelevant to the issues in that case or to any other case in which they had been specially employed by plaintiff.

Under date of April 23, 1902, a warranty deed to correct the error in the former deed was executed by Sarah McLean Campbell (*nee* Sarah McLean) and her husband to Mrs. Field, but this deed was not acknowledged until June 2, 1902, three days after the be-

Digitized by Google

ginning of this suit. It was filed for record July 2, 1902.

The charter of Kansas City in force at the times of the issuance of the tax bills, and of the institution of this suit provided "suits on special tax bills . . . may be brought in any court of competent jurisdiction . . . all or any of the owners of the land charged, or of any interest or estate therein may be made defendants in any suit, but only the right, title, interest and estate of the parties made defendants in any such suit shall be affected or bound thereby, or by the proceedings therein . . . it shall be sufficient for the plaintiff in any suit to plead the making and issuing of the tax bill sued on, giving the date and contents thereof, if any, and to allege that the party or parties made defendants own or claim to own the land charged or some estate or interest therein."

An action to enforce the lien of a special tax bill issued under these provisions is not *in rem* until after jurisdiction of the subject-matter has been acquired by the court in which the action is being prosecuted. [Land & Lumber Co. v. Bippus, 200 Mo. 688.]

In order to confer such jurisdiction the action must have a defendant or defendants who own the land sought to be charged or some interest or estate in it, and the judgment can affect only such interest or estate. The action must fail unless it be prosecuted against a defendant owning some interest or estate in the land (Parkinson v. Meredith, 158 Mo. 457; Parker-Washington Co. v. Kemper Inv. Co., 143 Mo. App. 244), since without such defendant the court could not acquire jurisdiction of the subject-matter. "The chief object in having the owner brought in would seem to be to enable him to contest the validity of the proceedings as a charge upon his property, and to discharge the lien, if he so desires, without sale thereof." [Vance v. Corrigan, 78 Mo. 94.]

Digitized by Google

"But it has been ruled in similar cases that the record owner would be the proper party unless the true owner was known to the holder of the bill. It seems to be considered that if the owner of the property fails to record his deed, and a tax lien holder brings his action against one who appears to be the owner by the record, not having notice of the title of the real owner, and proceeds to judgment and sale, it will convey the title in a way similar to the instance of one purchasing from the record owner without notice of any other title." [Parker-Washington Co. v. Kemper Inv. Co., supra; Jaicks v. Sullivan, 128 Mo. 177; Vance v. Corrigan, supra.]

Plaintiff claims that at the time of the commencement of this suit Mrs. Field appeared as the record owner of the fee simple title to the land and that plaintiff had no actual notice that she held it in trust for her father. The weakness of this position is apparent. So far as the record discloses, Mrs. Field had no title to any estate or interest in the land. The deed Sarah McLean had executed and delivered to her which she had filed for record was void on its face and, therefore, ineffective to convey any title. That plaintiff so regarded it was manifested by joining Sarah McLean with the present defendants. The record title on the date of the filing of this suit stood in Sarah McLean, subject to the contract of sale between her and Mr. Camp and since that contract had been fully performed by him, she held the legal and he the equitable or beneficial title. In other words, she and not Mrs. Field was the trustee.

The second deed from Sarah McLean to Annie Camp Field, though dated before the filing of this suit, was not acknowledged and recorded until after that date. The presumption must be indulged that it was not delivered and, therefore, did not become operative until after the date of the acknowledgment (Fontaine v. Bank, 57 Mo. 552), and when delivered it did

Digitized by Google

not relate back to its date or to the date of the void deed, at least, not for the purpose of imparting vitality to a still born suit. The doctrine of relation never has been carried to that extent. [Lumber Co. v. Zeitinger, 45 Mo. App. 114; Land & Lumber Co. v. Bippus, supra; St. Joseph v. Baker, 86 Mo. App. 310; Dickerson v. Bridges, 147 Mo. 235; Wilson v. Fisher, 172 Mo. 10; White v. Davis, 50 Mo. 333; Williams v. Husky, 192 Mo. l. c. 550; Parmelee v. Simpson, 5 Wall. 81.]

These considerations compel the conclusion that since Mrs. Field was not the owner of any interest or estate in the land she was not a proper party defendant and that since her husband, the only remaining defendant, clearly had no interest or estate but was only the agent of Camp in renting the property and paying the taxes, the suit must fail for lack of a proper defendant.

The judgment is affirmed. All concur.

ELIZABETH JOHNSON, Appellant, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, October 6, 1913.

1. **DAMAGES: Penal and Remedial Statute: Strict Construction.** As section 5425, R. S. 1909, stood prior to the amendment of 1905, the penalty feature inhered in and existed throughout the whole of the sum allowed. It was fixed at $5000, and no more, no less, and if penal at all, was penal throughout, that is, its penalty existed throughout along with its remediality. Hence, under that statute if plaintiff would seek a penalty, he must ask for the precise sum named in the statute, and if his petition asked for a less amount, it did not come within the statute and, therefore, stated no cause of action thereunder. Such statute must be strictly construed.

Digitized by Google

2. ———: ———: ———: **Amendment of 1905.** It would seem that if the language of the statute as amended in 1905 is accepted as it reads, then the element of penalty exists throughout the whole of the amount now specified the same as before the amendment. And if such is the construction to be placed on the statute as it now stands, then a petition which does not sue for the whole amount allowed by the statute, states no cause of action. To allow a plaintiff to sue for less than the whole penalty provided would enable plaintiffs to whittle down the state's penalties to suit their convenience thereby making different penalties in different suits for the same character of acts.

3. ———: ———: ———: ———. If, however, the statute, as it now stands, is penal only as to the $2000 minimum and compensatory as to anything in excess of that sum, then a plaintiff can either sue for the penalty alone, or for penalty with compensation. And, construing the case of Boyd v. Railway, 155 S. W. 13 as holding that the statue is penal only as to the $2000, it is held that a plaintiff can sue for the penalty only and therefore a petition asking for $2000, and making no claim for compensation, is not demurrable. Inasmuch as this holding involves the proper construction to be placed on the case of Boyd v. Railroad, supra thereby bringing into the case the question of the constitutionality of the statute as thus construed, this case is certified to the Supreme Court.

Appeal from Jackson Circuit Court.—*Hon. Jas. E. Goodrich,* Judge.

REVERSED AND REMANDED. TRANSFERRED TO SUPREME COURT.

J. Harold Olson for appellant.

Frank Hagerman, E. E. Ball and *Clyde Taylor* for respondent.

TRIMBLE, J.—Plaintiff brought this suit under section 5425, Revised Statutes of Missouri 1909, to recover a penalty of $2000 for the death of her husband caused by the alleged negligence of defendant's servants whilst running one of its trains.

Digitized by Google

The husband, while lying drunk upon the railroad track, was run over and killed by defendant's train as it was being backed out of the Union Depot in Kansas City where it had just delivered its passengers. A pilot, who had charge of the train, and who controlled it the same as an engineer, was stationed on the rear end. In substance, the petition claimed that the track where deceased was killed was in a busy part of the city and was used as a pathway by pedestrians at all times of the day and night, which fact was known to defendant, and it was thereby the duty of defendant's servants, and especially the duty of this pilot, to keep a vigilant lookout for persons on the track to avoid injuring them; that the pilot, after he saw deceased on the track could have avoided killing him but negligently failed to do so. The petition closed with the following: "That by reason of the premises plaintiff has been damaged and defendant should be made to forfeit and pay as a penalty the sum of two thousand dollars for which amount, with the costs of this action, she demands judgment."

The answer was a general denial and a plea of contributory negligence, to which a reply was filed, and the trial began. Defendant objected to the introduction of any evidence for the reason that the petition did not state a cause of action. The sole ground of this objection was that the statute on which the suit is based provides a certain penalty, but that penalty is not declared upon nor demanded in the petition, and, therefore, plaintiff has not brought her petition and case within the terms of the statute; in other words, since the petition did not declare upon the penalty provided in the statute, it stated no cause of action. This objection was overruled, and the case proceeded to verdict and judgment in plaintiff's favor for $2000. On motion for a new trial, however, the above point was again raised, and the trial court sustained defendant's contention in regard thereto, and granted a new trial

Digitized by Google

for the reason that, the suit being on section 5425, it does not lie within the power of the plaintiff to bring suit for a sum or penalty less than that provided by the section, and, therefore, a suit for the sum of two thousand dollars is not maintainable. Plaintiff appealed from the order granting a new trial. And the sole question presented is, can a plaintiff, under the section in question, as it *now* stands, sue for less than the maximum provided by that section? Or, to state it a little more accurately, can the plaintiff under said section limit her demand to $2000, or must she sue for whatever amount may be assessed by the jury in its discretion within the limits provided by the statute, namely, a minimum of $2000 and a maximum of $10,000?

Prior to the amendment of 1905, the amount recoverable for a death coming within the terms of this statute was placed at the fixed and immovable sum of $5000. Plaintiff could then recover neither less nor more. The words of the statute as to the penalty were "shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars." Under the section as it thus stood, prior to 1905, it was held that, as the amount specified in the statute was absolutely fixed at $5000, no more and no less, a suit could not be maintained which sought to recover less than that sum; that under such a statute, a plaintiff must declare for and seek to recover the precise or full measure of the penalty therein provided. [Casey v. St. Louis Transit Company, 116 Mo. App. 235, l .c. 260; same case, 205 Mo. 721, l. c. 723.] Since those decisions were rendered, however, the statute has been amended (Laws 1905, p. 135). That part of the section fixing the amount recoverable now reads, "shall forfeit and pay as a penalty, for every such person, employee or passenger so dying, the sum of not less than two thousand dollars and not exceeding ten thousand dollars, in the discretion of the jury." The

Digitized by Google

question now is, has this change in the statute rendered it permissible for the plaintiff to do in this case what she could not have done under the statute as it formerly stood? Unless this amendment has so changed the law that the reasons underlying the above named cases have ceased to exist, then said cases require with absolute certainty that the judgment of the lower court be affirmed. Have these reasons ceased to exist by virtue of the amendment? To answer this question we must first examine these reasons and then see whether or not the amendment has obviated or destroyed them.

As the Supreme Court adopted the opinion of the St. Louis Court of Appeals in the Casey case, the reasons underlying both of the above named decisions are to be found in an examination of that opinion.

The fundamental reason appearing therein why the plaintiff could not sue for less than the *fixed and precise* sum named by the statute was that the statute gave said sum as a penalty; and as the statute was thus penal, it must be strictly construed and "the suing party must bring himself strictly within its provisions and, among other things, *demand and recover the precise amount of the penal sum therein provided.*" [Casey v. Transit Co., supra, l. c. 252.]

Now, it must be borne in mind that, as the statute then stood, this penal feature *inhered in and existed throughout the whole of the* $5000 *allowed.* It necessarily must have done so since the amount was fixed at that precise sum, no more and no less, and if penal at all was penal throughout. It is true the statute was held to be both remedial and penal, but its remediality, if any, and *its penality existed in and pervaded the whole sum named,* thus making the whole sum a penalty. In other words, as the amount named by the statute was one fixed and certain sum there was no room for saying that a part of it would be considered penal and the remainder remedial. Both the pe-

Digitized by Google

nal and remedial features inhered in the amount throughout. Consequently whatever sum a plaintiff might seek to recover would have in it this penal feature. And if a plaintiff would seek to recover a penalty provided by the statute, he must ask for that penalty and no other. As said in Casey v. Transit Co., 116 Mo. App. 252, l. c. 254, speaking of the rule of strict construction, as applied to the penal and not the remedial feature of the statute, "it is manifest from the use of the word 'forfeiture' by the Legislature together with the consideration that no evidence is to be heard and no day in court to be had on the amount of plaintiff's damage and the measure of their recovery, that the amount named in the statute should be a penalty inflicted as a punishment upon the person guilty of the wrongs therein sought to be prevented. Applying then the rule of strict construction to the penal feature of the statute, the conclusion is that the penal sum therein fixed at $5000 means $5000. It does not mean $4500 no (any) more than it means $450 or forty-five dollars. Indeed it seems that the Legislature intended that the perpetrator of the mischief sought to be prevented should pay the full penalty levied and did not intend that the private citizen might fritter away that penalty provided by virtue of the police power of the State for the purpose of preventing wrongs, so that conditions might arise where one offender would pay $5000 and another be permitted to pay $4500 and another a much less sum as might suit the convenience of the party putting the statute into operation by his suit." All of which means that *as the whole of the* $5000 *is penal,* that is, the penalty inheres in all of it, as shown by the language of the statute and the fact that *no evidence is admissible on either side as to the amount of damages,* then a plaintiff must seek to recover the penalty provided, and will not be allowed to *whittle down* the State's penalties to suit his or her convenience, thereby making

Digitized by Google

different penalties in different suits for the same character of acts.

But in the statute, as now amended, *does the penal feature inhere throughout the entire sum* from the minimum limit of $2000 to the maximum limit of $10,000? In answer to this question whether or not the entire amount from one limit to the other is penalty, or has in it the elements of penalty, it would seem that, if the language of the statute is accepted as it reads, then the element of penalty extends throughout the whole of the amount specified by those limits. It says, "shall *forfeit* and pay as a *penalty* the sum of not less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury." The word "forfeit" implies a penalty and the words "as a penalty" expressly say it is such. So that on the mere face of the statute it would seem that the entire amount allowable was intended as a penalty. And in Young v. Railroad, 227 Mo. 307, the Supreme Court held that the whole amount allowed by the statute between the two limits was *penal* in character; and in Boyd v. Railroad, 236 Mo. 54, the holding is that it is both penal and remedial or compensatory, that is, that the penal feature exists along with the compensatory feature throughout the range fixed by the statute between the two limits. But in Boyd v. Railroad, decided March 28, 1913, and reported in 249 Mo. 110, 155 S. W. 13, l. c. 17, the Supreme Court expressly overrules the Young case in so far as it holds that the statute is penal throughout, and also expressly overrules the former decision in the Boyd case in the 236 Mo. 54, in so far as it holds that there is anything penal existing in the range permitted above $2000. And, in lieu of the doctrine announced by either the Young or the first Boyd case on this point, the Supreme Court announced the rule that said section, as it now stands, *is penal so far as it fixes the amount of recovery at not less than* $2000, but is remedial and

Digitized by Google

compensatory *as to any recovery in excess of that amount.* Of course this decision, in holding that the statute, by fixing the minimum at $2000, is *purely* penal, does not say, in express terms, that the *excess* is *purely* compensatory; in other words it does not expressly say that the penal feature does not extend above the $2000 and inhere therein throughout the range given along with the compensatory feature. But evidently that is the holding, else why expressly overrule the Boyd decision in 236 Mo. 54, which held that the whole range was both penal and compensatory?

It is also apparent that, in this last Boyd case, there is a distinction between a case in which only the penalty is demanded and one in which both penalty and compensation are sought. On page 16 of the 155 S. W. Reporter the court say:

"Upon a full consideration of this case in Banc, we are convinced that it was the intention of the General Assembly by the amendment of 1905 to leave the provisions of section 5425, supra, penal in their nature, so far as said section fixes the amount of recovery at not less than $2000, *but where a plaintiff,* as in this case, *seeks to recover* under said section *a larger sum than* $2000, the jury or court in preparing itself to exercise a wise and just discretion should receive evidence of the age, condition of health, and earning capacity of the party killed, and the consequent loss to the plaintiff thereby, together with the facts and circumstances attending the killing, for which damages are sought to be recovered. In other words, a recovery under section 5425, Revised Statutes 1909, is penal up to the sum of $2000, but the extent to which a plaintiff may recover, *if at all,* in excess of $2000 under that section, is remedial and compensatory." That is to say, if a plaintiff sues for penalty *only,* no evidence as to age, health and capacity of the deceased is admissible, since it could not help in any way, as the penalty must be applied regardless of these con-

Digitized by Google

siderations, if the jury believe the deceased's death was within the terms of the statute; but, if the plaintiff "seeks to recover a *larger* sum than $2000" such evidence is admissible and should be given. Evidently, therefore, there is a distinction between a suit for the *bare* penalty and one for the penalty with compensation. Because if every plaintiff suing under the statute must demand the maximum amount in the petition, what is the necessity of saying that the statute is penal as to the $2000? But where a plaintiff "seeks to recover a *larger* sum than $2000," evidence as to the *loss* plaintiff has sustained must be given. If all petitions must demand the full amount there was no necessity for using such language, but the court could merely have said that in all such suits evidence showing plaintiff's *damage* was admissible. It would seem, therefore, that the last Boyd case holds that the statute is penal only as to the $2000 and compensatory as to anything in excess of that sum. If so, then the State has given to plaintiffs in such cases, not merely *one* right, but one of *two* rights, namely, the right to sue either for the penalty *alone* or for both penalty *and* compensation. And if this is true, who is to say to plaintiff, "You cannot sue merely for the penalty but must sue for both penalty and compensation?" Grant it that a plaintiff is not allowed to vary or change the penalty prescribed by the State for the commission of a certain act. To sue for the $2000, under the statute as it now stands, is not to *vary* the penalty; it is to demand the precise sum fixed as penalty. The only thing plaintiff has varied, or rather given up, in her right to demand compensation. It is not certain that she has given up any compensation since the question whether she is entitled thereto or not depends on whether she has suffered damage. But whether she has given up her right to be compensated or not, is not a matter of State concern. The matter of compensation is her's to give up or sue for as she chooses. She may give it up,

Digitized by Google

either by not asking for compensation in her petition, or, if she has demanded it therein, by not offering any evidence showing that she is entitled to compensation. As the penalty is the lowest amount provided, it is no injustice to the defendant to permit plaintiff to forego the element of compensation *either* in her *petition* or in her *evidence*. If she is to be compelld to ask for it in the one, why should she not be refused entirely if she does not seek it in the other? It does not lie in defendant's mouth to complain because it is not called upon to pay a larger sum.

It is argued that if the statute is thus construed so as to permit a plaintiff to sue for less than the maximum, then we are placing on it a construction which will render it unconstitutional. With its constitutionality, of course, we have nothing to do. However, this claim that such a construction will render the statute unconstitutional is based on the view that the statute is penal, not only as to the $2000, but also as to *everything in excess of* $2000, and that to allow a plaintiff to sue for any amount less than $10,000, is unconstitutional in that it is permitting *her* to fix the penalty; that, in such case ,the penalty is fixed, not by the legislative power, but by the plaintiff in each particular case. [Citing Cigar Makers, etc. v. Goldberg, 61 Atl. 457.] Since the Supreme Court in the last Boyd case, supra, has said that the statute is penal as to the $2000 but is compensatory as to the excess, there is no basis upon which to rest the claim, that such construction would make the statute unconstitutional. But whether it is or is not thus rendered unconstitutional is a question for the Supreme Court to pass upon whenever its constitutionality is attacked. If the $2000 is all penalty, and all over that is merely compensation, then the legislative power has fixed the penalty at $2000, and plaintiff, by suing for $2000, is not fixing the penalty but is demanding what has already been fixed by the Legislature. The view that the stat-

Digitized by Google

ute is penal throughout the whole range between the two limits fixed therein, as announced in the Young case, supra, and the view that it is both penal and compensatory as to anything in excess of $2000 announced in the first Boyd case, has been repudiated by the Supreme Court in the last Boyd case, since, in it, the two above named cases are expressly overruled.

It is urged that the penalty is to be fixed "in the discretion of the jury" and that to allow plaintiff to sue for $2000 is to take away that discretion. This again assumes that the excess over $2000 is penal in its nature. But if it is not and only the $2000 is penal, then as to the *penalty* the jury has no discretion. If it believes that plaintiff was killed within the terms of the statute then the penalty is fixed, and its discretion operates *only upon the compensatory part of the recovery.* Even though a plaintiff bring a suit asking for the maximum amount, yet, if no evidence is offered upon which the jury can exercise its discretion as to compensation, the amount allowed cannot exceed $2000, because, in that event there is nothing upon which a verdict for a greater amount can be based. "The discretion of the jury" has nothing upon which to operate. But as to the $2000, if the killing was within the terms of the statute, *there is no discretion,* the penalty must be given. If, now, a plaintiff, by a mere failure to offer evidence on the compensatory feature, can take from the jury the discretion to award a larger amount than $2000, what is there to prevent such plaintiff from drawing her petition and bringing her suit in such way as to limit her recovery to the penalty purely and thereby limit the jury to the precise sum of $2000? In either case the jury is limited as to the amount of its verdict. And in both, if the jury believes the testimony tending to show that the death occurred under such circumstances as the statute requires, *there is no discretion to be exercised* but the jury must impose the pure penalty fixed by the stat-

Digitized by Google

ute, namely $2000. So that after all, the question comes down again to whether the last Boyd case means that, as to the $2000, the statute is penal, but *not as to any amount in excess of that sum.* From the language used, as well as from the fact that it expressly overrules both the Young and the former Boyd case (both of which held that it was penal as to such excess), we accept it as holding that it is penal only as to the $2000 and not as to any amount above that sum. If this is the correct view, then plaintiff has a right to sue for the penalty only, and to forego her right to compensation, if she was entitled to any compensation.

It is urged that plaintiff brought this suit for $2000 only in order to keep out of the Federal courts. But if, under the statute, only the $2000 is penalty, then she has a right to sue for that alone. And if she has a right to sue for it alone, her reasons for not also suing for compensation cannot be inquired into nor impugned. So far as that is concerned, as the penalty sued for is the *lowest* amount recoverable under the statute, she could in turn charge defendant with insisting that it be sued for the larger amount *solely* in order that the case could be taken to the Federal Court. In either case it is not a question of the motives of litigants, but of their rights under the law. The same is to be said in response to the objection that such a construction will enable a plaintiff to work a fraud upon the jurisdiction of the courts. There can be no fraud worked upon the jurisdiction of the courts by bringing a suit solely for the penalty, if there is a clear line of demarcation between the penal and compensatory features of the statute. As the holding of the last decision in the Boyd case by the Supreme Court is that the statute in question is penal only as to the $2000 and compensatory as to anything in excess of that amount, the logical result of such holding is that plaintiff can sue for the penalty prescribed without asking for compensation. The case should,

Digitized by Google

therefore, be reversed and remanded with directions to set aside the order granting a new trial and to enter judgment for plaintiff on the verdict. But, inasmuch as this holding involves the proper construction to be placed on the last decision in Boyd v. Railroad, and thereby there is brought into this case the question of the constitutionality of the statute, as hereinbefore stated, the case should be transferred to the Supreme Court. We have deemed it advisable, however, before doing so, to write this opinion expressing our views, so that our reasons for transferring it may be known and understood. Case transferred. All concur.

JACKSON COUNTY ex rel., JAMES B CLOW & SONS, a Corporation, Respondent, v. FREEBORN ENGINEERING & CONSTRUCTION COMPANY, a Corporation, Appellant.

Kansas City Court of Appeals, October 6, 1913.

PRINCIPAL AND SURETY: Contractor's Bond: Liability to Material Man's Vendor. A Contractor entered into a contract with a county to place a waterworks and septic tank system in the county home for the aged and infirm, and agreed to give bond to "pay all bills for materials used in said building and labor performed thereon under said contracts." The contractor sublet a portion of the contract to a firm of plumbers who bought of relator the material and plumbing fixtures sued for. These were delivered at the home and a part were used therein by the sub-contractors and the rest by the contractor after the sub-contractors had failed. The contractor was paid in full for the job but did not pay the subcontractors for the balance sued for, nor has relator been paid therefor. The bond was conditioned that the contractor should pay all bills for material used in said building and was made to the county and to all persons having the right to sue thereunder and by virtue of Sections 6761 and 6762, R. S. 1899. As these sections then stood a bond was

Digitized by Google

required which should be conditioned for all material used in the work whether by subcontractor or otherwise: Held that the relator is within the terms of the bond and can sue thereon although the materials were sold by relator to the subcontractors instead of to the contractors.

Appeal from Jackson Circuit Court.—*Hon. Jas. E. Goodrich,* Judge.

AFFIRMED.

Holmes, Holmes & Page for appellant.

Clarence J. Spellman for respondent.

TRIMBLE, J.—Jackson county, Missouri, entered into a contract with the defendant, Freeborn Engineering and Construction Company, whereby for $24,500 the latter agreed to furnish all labor and material to fully equip a water and septic tank system in the Jackson County Home for the Aged and Infirm. This contract provided that said construction company should give bond to the county in the sum of $12,250, conditioned that said construction company "shall pay for all material used and labor performed on this contract."

Pursuant to the contract, a bond was executed by the construction company as principal, with National Security Company, as security, conditioned that the said principal "shall pay all bills for material used in said building and labor performed thereon under said contract."

The construction company sublet a portion of its contract involving about $7000, to Allison & Hudson, a firm of plumbers. In attempting to carry out their subcontract, Allison & Hudson bought of relator a quantity of iron pipe, fittings, connections and plumbing fixtures, which the relator sold for, and delivered at, the Home to be used in the construction and installation of said plant. While no part of said materials

Digitized by Google

was furnished by relator directly to the construction company, yet after they had been furnished and a part of them used on the job by the subcontractors Allison & Hudson, the construction company took the job away from the subcontractors and finished it alone, using, however, the materials which were furnished and delivered by relator under its contract with the subcontractors. The subcontract was taken away from Allison & Hudson on April 1, 1910, and on June 10, 1910, thereafter, the construction company paid relator $900 on account. Before this suit was instituted, Allison & Hudson were adjudged bankrupts. And sometime in August, 1910, the construction company, in an account with Allison & Hudson took credit for the $900 paid to relator and also credited itself with an item of $783.03 to relator as of date July 21, 1910. As this last amount was never paid to relator, the presumption is that the construction company, by crediting itself with this sum, merely retained this amount out of the sum due Allison & Hudson in order to keep enough funds with which to pay the balance due on relator's account, which, after allowing all just credits and set-offs, was $721.91, with interest at six per cent from October 20, 1910. Of the $2016.08 worth of materials furnished by the relator, James B. Clow & Sons, all but $944.17 of it was shipped to the station near the County Home by relator after the Freeborn Construction Company had taken the contract away from Allison & Hudson and had commenced to finish the job alone. So that, after the subcontractors had been displaced, materials greater in amount than the sum now due on relator's account were furnished by relator and used by the construction company in the building. The county paid the construction company the full amount due under the contract, but the balance due relator has never been paid by anyone. After due demand, this suit was instituted in the name of Jackson county, at the relation and to the use of James B.

Digitized by Google

Clow and Sons, on the bond given by the Freeborn Engineering & Construction Company. In the trial court a jury was waived and the court rendered judgment on the bond for the face thereof to be satisfied upon the payment of the $721.91 due, with interest from October 20, 1910. The defendant Freeborn Engineering & Construction Company appealed.

The sole question presented by appellant is whether or not relator is among those for whose benefit the above mentioned bond was given; or, in other words, whether or not relator is included within the terms of the bond. Appellant claims that, as relator did not furnish the materials directly to the Freeborn Construction Company but only to a subcontractor, relator is not within the terms of said bond.

The contract and bond being executed simultaneously and for a common purpose, they are to be treated as one. And, in order to properly determine the question raised by appellant we must ascertain the intention of the parties as expressed in the contract and bond. And while that intention must be found within, and not outside of, the language used, yet we have a right to consider the situation of the respective parties to the contract and bond and the evident purpose they had in entering into them.

The language of the contract is that the Freeborn Engineering & Construction Company shall give a bond conditioned for the faithful performance of the contract and that it will "pay for all material used and labor performed on this contract." It does not read "for all material *furnished to* said construction company," but "for all material used." The language of the bond is equally broad and inclusive. In it the principal and surety declared themselves "firmly held and bound unto Jackson county, Missouri, and unto all persons having the right to sue hereon under and by virtue of sections 6761 and 6762 of the Revised Statutes of Missouri, 1899." And the condition is that

Digitized by Google

the principal shall faithfully perform the terms of the contract, and "shall pay *all bills for material used in said building.*" The contract and bond were executed November 4, 1909. At that time sections 6761 and 6762, as they appeared in the Revised Statutes of 1899, had been repealed and new sections numbered 6761 and 6762 had been enacted in their stead. [Laws of Missouri, 1909, p. 382.] These new sections, 6761 and 6762, had gone into effect August 16, 1909. So that, on the day the contract and bond were executed, November 4, 1909, the law governing such bonds stood as follows: "Section 6761. It is hereby made the duty of all officials . . . of any county . . . in this State, in making contracts for public work . . . to require every contractor for such work to execute a bond to the . . . county . . . and such bond . . . shall be conditioned for the payment for all material *used in such work . . . whether by subcontractor or otherwise.*" [Section 6762.] "Every person furnishing material, either as an individual or as a subcontractor for any contractor, with . . . any county . . . where bond shall be executed as provided in section 6761, shall have the right to sue on such bond in the name of the . . . county . . . for his use and benefit, etc." Under the law then it was the duty of the county court to require a bond, conditioned for the payment for all material used whether the same was used by a subcontractor or otherwise; and under section 6762 a right of action was given on said bond to every person furnishing such material. In this case the material furnished was all used on the building, part being used by the subcontractor and the remainder by the original contractor. Under such circumstances it would seem that not only are the terms of the contract and bond broad enough to include relator without regard to the statute, but also that the terms of the statute expressly provide for relator's protection by making it the county court's

Digitized by Google

duty to acquire a bond for the payment of all material used in the work whether by Allison & Hudson as subcontractors or by the original contractor the construction company.

It cannot be said that because the bond refers to persons having the right to sue by virtue of the sections as they appear in the Revision of 1899, and makes no mention of these sections as re-enacted in 1909, that the bond must, therefore, be interpreted and construed solely in the light of the sections as they were prior to the Act of 1909. Because the law says the bond shall be to the county, and also provides for a right of action thereon by every person furnishing material. So that, under the law, such person would have a right of action on the bond without regard to whether the words, "and unto all persons having the right to sue hereon under and by virtue of sections 6761 and 6762 of the Revised Statutes of Missouri, 1899," were in the bond or not. It being the duty of the court to demand the bond required by law, and it being executed under the law, no terms of the bond could limit the rights explicitly given therein by the law. Besides, when the sections under which the bond was given are referred to therein, the evident intention was to refer to the law as it then existed and not as it had stood at some former time.

Nor can section 6762, as re-enacted, be regarded as giving a right of action only to those furnishing material directly to the original contractor. Because the two sections must be construed together, and section 6762 evidently gives a right of action to all persons for whose benefit and protection a bond is required by section 6761. It is inconceivable that the Legislature would, in one section, require a bond to be given for the payment of all material used whether by subcontractor or otherwise, and then in the next section limit the right of recovery on said bond to a

Digitized by Google

narrower class of persons than that covered by the section requiring the bond to be given.

In support of appellant's contention that relator is not within the terms of the bond, we are cited to Berger Mfg. Co. v. Lloyd, 209 Mo. 681. But, in that case, not only was the language of the contract and bond narrower than in the one here, but also the facts were different and the bond was executed prior to the enactment of 1909. The Berger case was first decided by the St. Louis Court of Appeals. [Berger Mfg. Co. v. Lloyd, 113 Mo. App. 205.] The majority opinion, written by Judge GOODE, shows that the contract, instead of providing for the payment by the contractor of "all material used on this contract" as the one before us does, provided simply for the payment of all materials "furnished *to the contractor,*" and on this point the St. Louis Court of Appeals held that the Berger Company had not furnished the materials to the contractor. While the terms of the bond were broader than those of the contract in that case, yet the facts did not bring the Berger Company within the meaning of the bond since the material was sold and delivered to a manufacturer at its shops where it was manufactured into articles which were then used in the building. In other words, the Berger Company did not furnish to the contractor material that was used in the building within the scope and meaning of the bond. The case was, on the dissenting opinion of Judge BLAND, transferred to the Supreme Court, where the conclusion reached by the majority opinion of the St. Louis Court of Appeals was upheld. The Supreme Court say the determination of the question whether the Berger Company could recover on the bond in that suit "must be solved by ascertaining the intention of the parties to the contract and bond." The contract, as shown above, was not broad enough, because, as held by the Supreme Court, the contention of the plaintiff was unsound, that, as the materials

Digitized by Google

were furnished to the metal company and it manufactured them into certain articles and furnished them to the contractor, this was equivalent to the Berger Company furnishing them direct to Lloyd, the contractor. And as to the bond, even though it was conditioned that the contractor should make payment to the parties furnishing materials used in the work, yet as the contractor did pay in full the one furnishing to him the materials used, this was a strict compliance with the letter and spirit of the bond and contract. To sum it all up, the Berger case was decided simply on the wording of the contract and bond in that particular case and on the fact of payment by the contractor according to their strict terms. Nothing was said aobut the two sections of the statute nor was the question as to their breadth and scope under consideration. So that we do not consider the decision in the Berger case as placing relator in this case outside the pale of the statute regardless of the terms of the contract and bond or the facts as to payment by the contractor. In this case it is not shown that the contractor has fully paid the subcontractors for all the material used. On the contrary it appears that it has withheld a sufficient sum with which to pay relator's claim.

With regard to the intent and purpose of the two sections of the statute relating to bonds of this character, it has been frequently said that they are to give protection to every person who would have had a right to file a mechanic's lien on the building except for the fact that buildings of the corporations named in the act are exempt from the operation of the mechanic's lien law. [Press Brick Co. v. School District, 79 Mo. App. 665, l. c. 669; Board of Education ex rel. v. United States Fidelity Company, 149 S. W. 46, l. c. 50.] There is no doubt but that if the building in question was not exempt from the operation of the mechanic's lien law, the relator in this case would be

Digitized by Google

entitled to a lien. In such case, if the language of the contract and bond is broad enough to cover relator, the statute should not be given such a narrow construction as to exclude relator from any benefit thereof. Because the object of the statute was to extend protection to those furnishing material for use in such buildings and not to exclude them from such protection. If, therefore, the contract and bond are broad enough to include relator, there is no reason why it should be denied relief on this bond any more than on any other obligation entered into between two parties for the benefit of a class of third persons to which relator belongs. For even if it could be conceded that section 6762 was not broad enough to give a right of action to those for whom a bond is required in section 6761, still the insertion in the bond of the words "all persons having the right to sue hereon under and by virtue of sections 6761 and 6762" would not have the effect of limiting the right of recovery solely to those specified in section 6762 under a strict and literal construction thereof, nor would these words have the effect of overriding the other plain provision of the contract and bond since both these instruments must be considered together as one and the intention gathered from the four corners thereof. But there is no need of pursuing the subject further. We think that, under the facts as disclosed in this case, relator was within the terms of the contract, the bond and the statutes, and that the case should be affirmed. It is so ordered. All concur.

Digitized by Google

HENRY M. PATTERSON, Respondent, v. AMERICAN INSURANCE COMPANY, of Newark, N. J., Appellant.

Kansas City Court of Appeals, October 6, 1913.

1. **FIRE INSURANCE: Vacancy: Waiver.** Where suit is based on a policy having a clause rendering the policy void if the house becomes vacant without the consent of the company, and the defense is that the house was vacant at the time of the fire, but the plaintiff's claim is that the vacancy clause was waived, that claim is established if it is shown that when the house became vacant the company was notified thereof and it failed to either cancel the policy and return the unearned premium or to show its consent by attaching to the policy a vacancy permit.

2. ———: ———: ———: **Amount of Recovery.** If, in such case, the company was notified of the vacancy before the fire, and it failed to attach a vacancy permit but waived the vacancy provision in the policy, then the amount of recovery is determined by the policy and not by the terms of the vacancy permit, since the latter never came into existence, and the suit is on a policy with the vacancy clause eliminated.

3. ———: **Vexatious Refusal to Pay: Penalty.** Where there were enough contradictions in plaintiff's statements to the company to cause a reasonable man to doubt his claim that he had, prior to the fire, notified the company's agent of the vacancy which fact was absolutely essential to his recovery, the company had a right to litigate the question whether he had or not, and should not be penalized for so doing.

4. ———: **Sufficiency of Evidence: Jury Question.** Whether plaintiff's evidence that he notified the company's agent of the vacancy before the fire is contradicted by his admitted correspondence showing that he did not know of the vacancy until the fire, involves in the last analysis a weighing of the testimony in order to determine whether the contradiction was the result of fallible memory, and, if so, when the truth was told, and since the question was passed upon in a former appeal it will be treated as having been adjudicated and the question will not be reopened.

Appeal from Jackson Circuit Court.—*Hon. Jas. H. Slover*, Judge.

Digitized by Google

AFFIRMED (*conditionally*).

Fyke & Snider for appellant.

Yates & Mastin for respondent.

TRIMBLE, J.—For the second time this case is here on appeal by defendant. [See Patterson v. Insurance Co., 164 Mo. App. 157.] The suit is on a fire insurance policy covering a farmhouse. The policy contained a clause that, "If the building insured be or become vacant and unoccupied without the consent of the western manager of this company indorsed hereon, then this policy shall be null and void." There is no doubt but that the property became vacant some time, perhaps two months, before it burned on February 10, 1908.

At the first trial, considered on appeal in the 164th Mo. App., the defense was made that the house was vacant and no consent thereto or vacancy permit had been obtained, and the policy was, therefore, by its terms, null and void. To meet this defense plaintiff urged that *before* the vacancy occurred, he had an agreement with defendant's agent that, if the property became vacant at any time in the future, he would attach a vacancy permit, and therefore there was a waiver of the forfeiture in the policy as to vacancy without consent. On appeal, however, this court held that such agreement, *before* the vacancy, could have no effect because there can be no waiver of a forfeiture until after the ground of forfeiture has occurred, and remanded the case for a new trial, on the ground that, while plaintiff could not avoid the forfeiture because of such prior waiver, yet there was some evidence tending to show that plaintiff, *after* the vacancy and about three weeks before the fire, had notified the defendant's agent of the vacancy and requested him to issue and attach a vacancy permit, and if this were

Digitized by Google

true, defendant had, by failing to act, waived the forfeiture.

Upon a second trial this feature of the case was litigated and a verdict for plaintiff was returned for the full amount of the policy with interest and seventy-five dollars additional as ten per cent damages and a further sum of $112.50 as a reasonable attorneys' fee for vexatiously refusing to pay the amount due plaintiff.

Defendant contends that the case should be reversed because plaintiff's own testimony, and the conceded circumstances under which the notice and request are claimed by him to have been made, show that no notice was even given or request made. This contention requires an examination of the testimony.

Plaintiff was living in Oklahoma. The house in question was in Jackson county, Missouri, near Independence. Plaintiff had an agent at Independence, named Noland.

Plaintiff's claim that he notified Rider, defendant's agent, of the vacancy and to put a vacancy permit on the policy is based on his testimony that on January 21, 1908, he wrote Rider, defendant's agent, at Independence, Mo., as follows: "I have been informed that my house upon which I hold American Insurance policy has become vacant. Please see that vacancy permit is placed." Defendant's agent, Rider, denied ever receiving such a letter. Plaintiff introduced in evidence a pencil copy of such alleged letter, the defendant not producing the original on notice to do so. The testimony of plaintiff that he wrote such a letter on January 21, 1908, would not appear strange were it not for the fact that on February 13, 1908, three days after his house burned, he wrote to his agent, Noland, saying: "Yours of the 10th at hand saying that my house had burned down. Have you gotten any particulars in the case since writing? Now, Mr. Nowland, I want you to give me the two fol-

Digitized by Google

lowing points, namely, how long has the house been vacant, and have you had a vacancy permit on, or did you have a vacancy permit on when the house burned. Please write me these questions by return mail, and don't say a word to the insurance agent about this as it may cut a figure in the way of getting my insurance."

On March 15, 1908, plaintiff again wrote his agent, Noland, as follows:

"Regarding the burning of my house I hold an insurance policy for $750, of which I have been trying to adjust with the company. They have now turned my claim down and refuse to pay any part on the ground the house was vacant at the time of fire. Mr. Noland, this is rather a severe blow on a poor man like myself. Now what I wish to do is this, establish if possible more proof regarding the exact situation. Eventually I may be compelled to fight them in the courts as a last resort after all other means have failed, thereby making possible much trouble for us all. Now, Mr. Noland, I want you to assist me in this matter by trying to learn the true standing of the case as regards to a vacancy. Are you certain that there was nothing left in the way of furniture, a chair, table, stand, or other article in the building at the time of the fire, or at the time that you was there when you reported to me that the building was vacant? Such articles might establish in law an occupancy.

"Do you know where Mr. Green Allen, the former tenant is; try and find out so I can write him concerning the case. The insurance agent at Independence agreed to place vacancy permits on the house in case of vacancies. Suppose he must have neglected to do so. Kindly learn all you can about the case and report as early as possible."

Twelve days later, on March 27, 1908, plaintiff wrote Rider, the insurance agent, at Independence as follows:

Digitized by Google

"Yours of recent date was duly received, replying will state that adverse to your understanding, *I was not aware that the house in question was vacant until aboui the time the fire* occurred, this being the case along with circumstances as named in previous letter I am unable to see where I am at fault."

These letters were admitted by plaintiff to have been written by him, and he stated that he tried to give Rider the true state of facts.

It must be conceded by all candid minds that these letters, written by plaintiff after the fire, make his statement, that he wrote the letter of January 21, sound "mighty fishy" if a colloquialism may be permitted in a judicial opinion. On March 27, 1908, he wrote Rider, "I was not aware that the house in question was vacant until about the time the fire occurred." But now he claims that on January 21, 1908, he wrote the agent saying he had been informed the house was vacant and to put a vacancy permit on the policy. When did he tell the truth? Now or then? Did he tell it when he wrote the letter of March 27th and thought it would be of some help to him to claim ignorance of the fact it was vacant, or did he tell it when he has learned it is necessary in order to recover to know of it and notify the agent of the vacancy on January 21st? It is said, that however this may be, it is a question for the jury to say whether he told the truth the first time or the last. But is there not room for a third supposition, namely, that the truth was not told on either occasion? It seems to the writer that if the effect of a failure to secure a vacancy permit can be obviated, under such circumstances as are disclosed here, then the vacancy clause in any policy can be eliminated and rendered nugatory by the plaintiff calmly claiming that he notified the agent of the vacancy and relying confidently upon the verdict of a jury to do the rest. It may be that, strictly speaking, it is a question for the jury to say whether he told the truth the first,

Digitized by Google

second, or neither of said times and consequently we have no right to interfere. This question was considered in the former decision in passing on the defendant's demurrer to the evidence, and it was held that although plaintiff's evidence was "strongly contradicted" yet the evidence that the notice of vacancy was given was of sufficient substance to justify the resubmission of the case to the jury. [Patterson v. Ins. Co., 164 Mo. App. l. c. 164.] The evidence then was the same as now, and consequently, the question can be said to have been once adjudicated and settled. In view of this fact, and in view of the further fact that the jury is perhaps the judge of the question when the truth was told, if ever, and that, possibly there may be ground for attributing the inconsistency to mistake and the fallibility of human memory, and that two juries and two trial judges and three appellate judges have heretofore held with plaintiff in the matter, the writer is inclined to be reserved and conservative in his opinion on the point and to hold, not without some considerable worry and misgivings, that the obvious contradictions and inconsistencies between plaintiff's testimony and his admitted acts are not sufficient to entirely overthrow the evidence upon which plaintiff's case went to the jury.

Defendant contends also that if plaintiff is entitled to recover at all he is not entitled to recover more than three-fourths of the face of the policy, since the only vacancy permit in use by the company provided that, if the fire occurred while the property was vacant, the amount recovered should be only three-fourths of the loss. But this contention is based on a misconception of the grounds upon which plaintiff's right to recover is planted. The *policy* does not provide that if the loss occurs while the house is vacant, the amount due thereunder shall only be three-fourths of the loss. That appears only *in the vacancy permit.* The suit is not based on a policy with a vacancy per-

Digitized by Google

mit attached, but on a policy in which the clause rendering it void has been eliminated by waiver, leaving it a policy for the full amount insuring the house whether vacant or occupied. The case of Sullivan v. Ins. Co., 89 Mo. App. 106, is not in point because in that case the vacancy permit had become operative. In other words, the suit in that case was on a policy with a vacancy permit attached, and hence plaintiff could recover only according to the terms thereof. The suit is not based in any manner on the permit, neither are its terms set up as matter of defense by the pleadings. The sole issue was whether the policy was in force or had become void by reason of the vacancy, and that issue depended solely on whether the forfeiture had been waived. The condition in the policy as to the property being vacant can be waived the same as any other condition. [Clay v. Ins. Co., 25 S. E. 417.] If proper notice is given, the policy will remain in force until the insurer takes action to terminate the insurance. [2 Cooley's Briefs on Ins., 1657-8; Wakefield v. Ins. Co., 7 N. W. 647; Strunk v. Ins. Co., 28 Atl. 779.] The only place in which the reduction of one-fourth of the insurance appears is in the vacancy permit itself, not in the policy, and since the vacancy permit never came into existence at all, the reduction clause never came into existence. The policy was on the house for a certain amount of insurance with a clause rendering it null if the house became vacant without the consent of the company. When, as found by the jury, the company was notified on January 21, 1908, that the house was vacant, it had three alternatives, 1st, to immediately cancel the policy and return the unearned premium; 2nd, to consent to the vacancy and place a permit on the policy which by its terms would reduce the insurance one-fourth; 3rd, to waive the vacancy clause in the policy by making no objection and retaining the premium, thereby leaving the policy in force for the full amount with nothing

Digitized by Google

in the policy concerning vacancy. According to the verdict, this is what was done. The amount of insurance due, therefore, is the amount of the policy.

In addition to the question of waiver the trial court submitted the question of vexatious refusal to pay the loss, and the jury, in addition to a finding of $959.12 due on the policy, assessed a penalty of seventy-five dollars and an attorney's fee of $112.50 under section 7068, Revised Statutes of Missouri 1909. In our opinion the record does not disclose any evidence to warrant the court in submitting the question of vexatious refusal to pay. It is true the whole question of vexatious delay is a question for the jury, as has been decided by Keller v. Insurance Co., 198 Mo. 440, but it is only so when from a general survey of all the facts and circumstances in the case an inference can be drawn that the refusal was unjustifiable and vexatious. [Keller v. Ins. Co., supra, l. c. 460, 461.] And while affirmative proof is not required to show vexatious refusal, yet the penalty should not be inflicted unless the evidence and circumstances show that such refusal was willful and without reasonable cause as the facts appeared to a reasonable and prudent man before the trial; and merely because the judgment, after trial, is adverse to defendant's contention, is no reason for inflicting the penalty. [Blackwell v. Ins. Co., 80 Mo. App. 75.] In the first trial, plaintiff relied upon an oral agreement on the part of the agent that, if the house became vacant in the future he would attach a vacancy permit. This, defendant contended, was not valid and, on appeal, defendant's contention was upheld. A refusal to pay on this ground could not be held vexatious; and while plaintiff's claim that he wrote a letter to defendant's local agent notifying him of the vacancy has been upheld by the jury in the second trial, and a waiver of the vacancy clause has been thereby established. still, in view of the admitted correspondence of plaintiff con-

Digitized by Google

tradicting his claim of having written such letter, and the denial of the agent of having received it, the company had a right to litigate that question without being penalized for so doing. In other words, the facts and circumstances admitted by plaintiff are sufficient to give the company reasonable grounds for defending the suit and takes the element of vexatiousness out of its refusal to pay.

If, therefore, the plaintiff will, within fifteen days, file a remittitur of $187.50, being the aggregate amount of the penalty imposed and attorney's fee assessed, together with six per cent interest thereon from the date of the judgment, this cause will be affirmed, otherwise it will be reversed and the cause remanded. All concur.

FANNIE EBERT, Administratrix of the Estate of WILLIAM F. STEINBRINK, Respondent v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, October 6, 1913.

1. **NEGLIGENCE, CONTRIBUTORY: Imputed Negligence: Jury Question.** Deceased was a lad fifteen years of age. In company with a full grown man, who acted as driver, he rode in a wagon out of a livery stable down an inclined runway to the street upon the track twenty-two and one-half feet away from the starting point, and was there struck and killed. He had no authority or control over the horse, driver or wagon. In such case, if the driver was negligent it cannot be imputed to the boy. There was nothing to cause the boy to anticipate that the horse would go or be driven rapidly upon the track, and the short distance the wagon went before being struck, and the suddenness with which the danger arose, will prevent the appellate court from holding the boy guilty of contributory negligence as matter of law. If there was any evidence showing negligence, or from which it could be inferred, the question of contributory negligence would be for the jury.

Digitized by Google

2. ———: ———: **Instructions.** An instruction attempting to submit the issue of deceased's contributory negligence to the jury should not confuse the non-imputable contributory negligence of the driver with that claimed against deceased since to do so is to confuse and mislead the jury as to the facts from which they could infer contributory negligence against the boy. The refusal of such an instruction is not error.

3. ———: ———: ———. It is not error to refuse an instruction withdrawing from the jury one of the grounds of negligence charged if there is any evidence showing such grounds or from which it can reasonably be inferred. Neither is it error to refuse an instruction telling the jury that recovery cannot be had unless a specified ground was the sole cause of the injury, where other grounds were specified and the injury may have been caused by the several grounds combined.

4. ———: ———. ———. An instruction is erroneous, and is therefore properly refused, which tells the jury that the conduct of the motorman just prior to the collision and the speed of the car at that time are "immaterial" if the car was not going more than twenty miles per hour. The conduct of the motorman and the speed of the car just prior to a critical instant are material as throwing light on what was the probable conduct and speed at that instant.

5. ———: ———: **Accident.** It is not error to refuse an instruction saying that defendant was not liable if the death was caused solely by an unfortunate accident. Such instruction was not applicable to the facts in this case since it ignored the real issue, namely, the presence or absence of care on the part of defendant and did not define or explain the meaning of the term accident.

6. ———: ———: **Burden of Proof.** Where the court has given a correct instruction on burden of proof it is not error to refuse another instruction on that subject a little more strongly worded in defendant's favor.

7. **TRIAL PRACTICE: Witnesses: Impeachment by Contradiction.** Where it is desired to contradict a witness by proving contradictory statements made in a prior written account of the affair, the witness must be shown such statement and his attention called to the contradictory statement, before it can be offered in evidence to impeach him. Where the evidence shows that the witness did not write the statement but merely signed it without reading, simply showing the witness his signature and getting him to identify it is not sufficient to render the statement admissible. Its exclusion, therefore, was not error.

Digitized by Google

Appeal from Jackson Circuit Court.—*Hon. Jas. A. Guthrie,* Judge.

AFFIRMED.

John H. Lucas and *T. B. Buckner* for appellant.

Brewster, Kelley, Brewster & Buchholz and *Ben R. Estill* for respondent.

TRIMBLE, J.—William Steinbrink, an unmarried minor, fifteen years of age, whose parents were dead, was injured by one of defendant's street cars striking and overturning a grocery wagon in which he was riding. He died as a result of his injuries, and his executrix instituted this suit under section 5425, Revised Statutes of Missouri 1909. She obtained judgment and defendant has appealed.

The lad had started to work that morning for a grocer, and, in company with Bert Hosman, a man who drove the grocer's delivery, went to a livery stable to get the horse and wagon with which groceries were delivered. This stable fronted west immediately on the property line on the east side of Indiana avenue in Kansas City, Missouri, and was 223 north of the intersection of said avenue with Twenty-sixth street. The stable floor was higher than the sidewalk, and a runway sixteen feet in length extended from the floor to the street at the curb. Down this runway vehicles were driven in leaving the barn.

Indiana avenue was forty feet wide and the east track of defendant's car line was twenty-two and one-half feet from the barn entrance. When Coontz, the stable hand, had harnessed the horse to the wagon, Hosman took the driver's seat, and with, the boy either sitting beside him or standing in the wagon behind and holding to the seat, drove down this runway to the street. The wagon had almost cleared the track

Digitized by Google

when a northbound street car struck the rim of the left rear wheel overturning the wagon and injuring the boy.

From Twenty-sixth street north it was down grade on Indiana avenue, and at a point twenty-five feet north of said street and 198 feet south of the livery barn was a "safety stop" which required all north bound cars to make a stop at that point before proceeding further.

The negligence charged was that the car was being run at a dangerous rate of speed in excess of twenty miles per hour and in violation of an ordinance limiting the speed to that rate; also that no safety stop was made at the point required, and that the operator of the car saw, or, by the exercise of ordinary care, could have seen, deceased in a perilous situation in time to have stopped or slackened the car with safety to the passengers and avoided the injury, but that he negligently failed to do so. The answer was a general denial and a plea of contributory negligence on the part of the driver and of deceased in driving rapidly from the barn to the track without looking or listening for the approach of a car and so close in front thereof as to render a collision unavoidable.

Appellant's first point is that no proof was made that deceased was an unmarried minor. But the record shows to the contrary, so the point is valueless.

The next point is that deceased was guilty of contributory negligence in riding rapidly down the runway without looking or listening for a car. This renders it necessary to determine at the outset what negligence can be charged against the deceased as being contributory so as to bar a recovery. Under the peculiar circumstances of this case, the negligence that would bar a recovery must be that of the deceased himself, not that of Hosman, the driver. The deceased was a mere lad. He had no authority over the driver nor control over the management of the horse or

Digitized by Google

wagon. If Hosman drove the horse rapidly down the runway, the boy, when he got into the wagon, had no means of knowing that he would do so. He had never been there before. After the start was made, the wagon had only twenty-two and one-half feet to go to reach the point of danger and that down an inclined runway. In going that short distance he had no opportunity either to warn the driver or to save himself. Even if the driver was negligent it cannot be imputed to the boy. In Shultz v. Old Colony Street Railway, 193 Mass. 309, the question of imputed negligence is gone into thoroughly and the decisions of the various States upon this question carefully reviewed. It was held that if one, while being driven in a carriage as a guest or companion of the person driving, is injured by a collision on a public highway caused directly by the negligence of a third person, to which negligence on the part of the driver contributed, he may recover against the negligent third person in spite of the negligence of the driver if personally he was in the exercise of all the care which ordinary caution requires. It was also held that, if such person has no ground to suspect incompetency or to anticipate negligence on the part of the driver, and the impending danger was so sudden or of such a character as not to require or permit any act on the part of such person for his own protection, such person may recover from the negligent third person even though the driver was also negligent. This doctrine is peculiarly applicable to the facts in the present case. The boy had no reason to anticipate negligence on the part of the driver, and the danger arose so suddenly and under such circumstances as not to require or even permit the boy to do anything for his protection. The same doctrine is announced and followed in Missouri. [Baxter v. St. Louis Transit Co., 103 Mo. App. 597; Zalotuchin v. Railway, 127 Mo. App. 577; Stotler v. Railroad, 200

Digitized by Google

Mo. 107, l. c. 143-148; Turney v. United Railways, 155 Mo. App. 513; Moon v. Transit Co., 237 Mo. l. c. 435.] A careful reading of the record fails to disclose any evidence that, at the time the wagon started and afterward during its journey downward, the boy omitted to do anything for his safety that he could or should have done. The presumption that he used due care is in his favor, and the remarks in Stotler v. Railroad, 200 Mo. l. c. 146-7, apply with force to him. There was no testimony as to what was done by either the boy or the driver in regard to the exercise of care on their part. Neither side, for some reason, put Hosman on the stand, who was the only one who could have testified as to what was done in this regard. At best, therefore, if there was any evidence showing negligence on the boy's part, or from which it could be inferred, the question whether the boy was guilty of contributory negligence which would bar a recovery would be one for the jury. [Turney v. United Railways, 155 Mo. App. 513.] And, even if the boy was guilty of negligence, still, under the count based on the humanitarian doctrine, if the motorman saw, or, by the exercise of ordinary care, could have seen, deceased's perilous situation in time to have avoided the injury by the exercise of ordinary care and with safety to his car, and failed to do so, still defendant is liable. We are, therefore, clearly without authority to reverse the case outright. Especially so because, the evidence is conflicting as to the rate of speed at which the horse and the car respectively approached the point of collision, and as to when the motorman could have first seen the horse and wagon emerge from the barn. Coontz, the stable hand, says the horse went down in a walk and that the car was running at a speed of thirty or thirty-five miles per hour. The motorman says the horse came down rapidly, jumping and "lunging" and that his car was traveling from ten to fifteen miles per hour and was only twenty or thirty

Digitized by Google

feet from the point of collision when he saw the horse emerge from the stable door. Coontz says he noticed the motorman when the car was 100 feet away. He says the horse at this time was going down the runway to the track, and that the motorman was not looking ahead of him but was gazing out the side window of his car at a woman in an adjacent yard, and did not see the wagon until almost on it, and then he attempted suddenly to stop. The motorman denies this. The evidence of the other persons as to the speed of the horse and proximity of the car to the stable door when the horse emerged therefrom could not have had much determinative force with the jury because their evidence shows they did not notice or see anything unusual until the sudden slackening of the car caused them to look, and at that time the car was about to strike the wagon. Of course, at this time, the horse was jumping and excited and moving rapidly because of his fear of being struck and also because, at this time, his driver was slapping him with the lines in the endeavor to get hurriedly out of the way. So that the testimony is practically limited to that of the motorman on one side and the man Coontz on the other as to what occurred at the all important moment when to see and act on the part of either side would have prevented the tragedy. Whatever negligence there was, whether on one side or the other or on both, arose at this crucial moment and not at the instant of collision. If when the car was 100 feet away, the motorman, by the exercise of ordinary care, could have seen the wagon was entering into a perilous situation and the car could have been safely stopped within thirty or forty feet, or even slackened, so as to avoid the injury, and the motorman failed to do so because his attention was attracted elsewhere, then there was culpable negligence on his part for which the defendant is liable. Or, if his car was going thirty or thirty-five miles per hour, in violation of the speed

Digitized by Google

ordinance, so that, by reason of such rapid rate, it was enabled to pounce unawares upon a traveler crossing the track with due care, believing, and having a right to believe, that the car would not run at an unlawful rate of speed, then defendant is liable. If what Coontz says is true, the jury could have found the collision was caused by defendant's negligence under either of the above alternatives. If what the motorman says is true, there was no negligence on the part of the company. Which of these two witnesses is telling the truth? Are we to answer that question, or is it for the jury to say? Of course there can be but one answer. The jury, under our system, is the final arbiter of disputed facts not in themselves wholly unreasonable or impossible. It is true there are some slight inaccuracies and perhaps discrepancies in Coontz's testimony, but not enough to justify us in saying his testimony is destroyed.

Coontz's testimony was by deposition. At the taking thereof he was asked by defendant if he had not made a statement to defendant's claim agent concerning the accident and said that he had. He was then shown his signature to a paper and identified it as his, but was not allowed to see or read the contents thereof which had been written by the claim agent, and which the witness signed without reading. Neither was his attention called to the fact that the statement contained an allegation that he (the witness) was in the harness room and did not see the accident. At the trial, defendant offered in evidence this written statement to contradict Coontz's statement in his deposition that he was standing in the door of the stable and saw the whole occurrence. The paper was properly excluded as the attention of the witness was not called to the inconsistent statement therein. The witness was not a party to the suit and before he could be contradicted by the introduction of a written inconsistent statement, a foundation should have been laid

Digitized by Google

by calling his attention thereto and giving him an opportunity to explain it or correct himself. [Wigmore on Ev., sec. 1025; Ely Walker v. Mansur, 87 Mo. App. 113.] The cross-examination of this witness was not at the trial but at the time of taking his deposition, and neither the witness nor counsel for the other side were permitted to see the paper or to know what particular contradictory statement was contained therein. Hence, at the trial, there was no opportunity to place the witness back on the stand and give him a chance to explain such contradictory statement. It was known at the time of taking the deposition that the witness would not be present at the trial, and, therefore, it was incumbent on the party holding the impeaching paper to call the witness' attention to the contradictory statement therein at that time, as that was the only time when it could be explained.

Complaint is made of the refusal of defendant's instruction "A" which sought to eliminate the charge that the car did not stop at the "safety stop" as one of the causes of the accident. The ground of this complaint is that there was no evidence that the car failed to make said stop. But while there is evidence that it did make said stop, there is also evidence from which the jury could find that it did not stop. Hence the refusal of said instruction was not error.

Defendant's instruction "B" was also properly refused since it told the jury that excessive speed of the car would not authorize a recovery unless it was the *sole* cause of the injury. Excessive speed of the car did not have to be the sole cause of the collision. If such speed combined with the failure of the motorman to keep watch and stop or slacken the car caused the collision, defendant would be liable.

Defendant prayed instruction "C" which was refused, and error is claimed. The instruction is as follows:

Digitized by Google

"Although the jury shall believe from the evidence the car in question was running at an excessive and unlawful rate of speed, and struck the wagon in which deceased was riding, if they shall further believe from the evidence in the case, the driver of the wagon in which deceased was riding and also said deceased went upon said track without looking or listening for an approaching car, and, that the motorman of said car could not, by the exercise of ordinary care, have stopped or slackened the speed of the car, after he saw, or by the exercise of ordinary care could have seen, deceased in a position of imminent peril, then you will find a verdict for the defendant."

This instruction does not clearly and correctly differentiate between the negligence of the driver and the boy, but is so worded as to lead the jury to believe that the driver's negligence should be considered along with that of the boy's and that the boy was in some way connected with and affected by the driver's negligence. But, unless the boy was himself negligent, there was no contributory negligence in the case. He had a right to assume when he got into the wagon and started down the incline that, if a car approached, it would do so at a lawful and not an unlawful rate of speed. He had no means of guarding against the approach of a car at an excessive speed, and on opportunity of keeping off the track after its excessive speed could have been discovered, nor of anticipating negligence on the part of the driver. Nor can contributory negligence be inferred against him because the horse may have been driven rapidly down the runway by Hosman as testified to by the motorman. The distance the wagon had to go to get on the track was only twenty-two and one-half feet and that down an incline. In going that short distance the boy would have no opportunity to save himself or to warn the driver after they had started. And when the start was made he had no opportunity to know that the approach would

Digitized by Google

be made rapidly or in close proximity to an approaching car, nor could he do anything to prevent it. As said above, the boy could not anticipate negligence on the part of the driver or the motorman, and he could not, under the circumstances, save or protect himself after the danger became apparent. The presumption is that the boy acted with due care, and there is nothing in the evidence or the circumstances from which it can be inferred that he did otherwise. He was leaving a building down an inclined runway from which he could see a car approach in time to keep out of its way if it was going at a lawful rate of speed, but not if it was going at an excessive rate. If there is no evidence from which it can be inferred that the boy was himself guilty of contributory negligence, and he was caught on the track by reason of the swiftness of the car in rushing upon him at an excessive speed, then such speed was the culpable cause of the injury and the defendant is liable whether he had time to stop after he saw the situation or not. In such case the effect of the instruction, worded as it was, would be not only to confuse the jury as to the facts from which they could infer contributory negligence against the boy, but it would also eliminate excessive speed as one of the culpable causes of the collision. The case of Schmidt v. Railway, 191 Mo. 215, does not in any way militate against this view. In that case the circumstances and the sworn testimony both were such as to overturn the presumption of due care. But in the case we are now considering not only is there no evidence to the contrary, but the facts show that, on account of his situation, deceased had no means of guarding against the approach of a car at excessive speed, and no opportunity of keeping off the track after its excessive and dangerous speed could have been discovered. The instruction, therefore, was properly refused.

Digitized by Google

The same is true of defendant's refused instruction "E." It declared that the speed at which the car was moving and the conduct of defendant's motorman prior to the starting of the wagon out of the barn were wholly immaterial questions if the car was running less than twenty miles per hour. But the evidence of misconduct on the part of the motorman also discloses that at that time the horse had emerged from the barn. Besides, the speed of the car and the conduct of the motorman immediately before the horse emerged would tend to throw some light on its speed and the conduct of the motorman immediately after or at the instant the horse emerged. Even if the car was running less than twenty miles an hour, yet if the motorman was not looking ahead but had his attention attracted elsewhere, there would be culpable negligence for which defendant would be liable unless deceased was guilty of contributory negligence. It could not be said, therefore, that the speed of the car and the conduct of the motorman prior to the emergence of the horse from the barn were "wholly immaterial questions."

Defendant's instruction saying that defendant was not liable if the death was caused solely by an unfortunate accident, if it had any place in the case, was misleading since there was no explanation or definition of what was meant by the term accident. Again, the instruction was not applicable to the facts in the case as it ignored the real issue, namely, the presence or absence of care on the part of defendant. It was, therefore, properly refused. [Zeis v. Brewing Assn., 205 Mo. l. c. 649-50.]

An instruction was also refused defining burden of proof as meaning that "the facts and circumstances in behalf of plaintiff must be so clear and strong as to admit of no other reasonable conclusion than that the death of deceased was caused by the negligence of defendant." The court refused this and gave the

Digitized by Google

usual instruction in such cases that the burden of proof was on plaintiff and he must establish defendant's negligence, and that it caused decedent's death, by a preponderance of the evidence, and by that is meant the greater weight of the credible testimony in the case. This was a sufficient instruction on the matter.

The judgment is affirmed. All concur.

FERN HEDRICK, Appellant, v. GEORGE H. KAHMANN, et al., Respondents.

Kansas City Court of Appeals, October 6, 1913.

1. **MASTER AND SERVANT: Negligence: Assistant Superintendent: Laborer.** Though one is a civil engineer and an assistant superintendent in the construction of a bridge across a river, yet on the order of his superior, in which he acquiesces, he may become a common laborer under the direction of a foreman to whom he is assigned; for it is the service and not the rank which determines the capacity in which he acts.

2. **———: ———: Volunteer: Laborer.** An assistant superintendent in constructing a bridge who by order of his superior takes up the work of a common laborer under a foreman, is not a volunteer disabled from recovering damages resulting from the foreman's negligence.

3. **———: ———: Fellow Servant: Foreman.** An assistant superintendent in constructing a bridge, who by order of his superior takes up the work of a common laborer under the direction of a foreman, is not a fellow servant of such foreman.

4. **———: Negligence: Material: Selection: Foreman.** Though a master may furnish suitable material with other that is not suitable, yet if the selection of proper material is left to the servant and he selects the unsuitable kind, the master cannot be held liable to him or his fellow servants. But if the master's representative, in the person of a foreman, selects the unsuitable material, the master is liable to any servant injured thereby. Cases distinguished.

Digitized by Google

5. ———: ———: ———: New Trial: Substantial Evidence. Where the trial court grants a new trial to a defendant on the ground that a peremptory instruction should have been given to find for such defendant, it is error if there is any substantial evidence to support the verdict under the law.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas,* Judge.

REVERSED AND REMANDED.

Milton J. Oldham and *Jesse E. James* for appellant.

Boyle & Howell, Jos. S. Brooks, and *William T. Woodford* for respondents.

ELLISON, J.—Kahmann, one of the defendants in this case, died, and the cause was revived. For convenience we shall refer to defendants as though the death had not occurred. Plaintiff is the widow of Otis Hedrick, who was in defendants' employ when drowned in a river in Oklahoma. She brought this action for damages and recovered judgment. Defendants' motion for new trial was sustained and she appealed. Defendants were contractors constructing a railroad bridge across the Canadian River in Haskell county, Oklahoma. The bridge was partly constructed when the water had caused one of the unfinished piers to become unstable by getting much out of perpendicular. It had been suggested to tear it down, but defendants had expended considerable money on it and did not like to lose that outlay if it could be avoided. They therefore employed deceased, a civil engineer, to go from Kansas City, Missouri, down to the work, to help with the bridge, especially with a view to saving the pier. There was evidence tending to show that he was put in as assistant superintendent of the construction under one Roach, the general superintendent. But when he got to the place it was found that things were

Digitized by Google

not in readiness for his work in his capacity as engineer on the pier, and while waiting and in order that he might not be idle, he was put at other work as an ordinary or common laborer. The particular labor at which he was engaged on the day of his death was making a roadway from the river at a place about three hundred feet above the bridge. A tramway or false work about eight hundred feet long had been constructed across the river. A track was laid on this tramway, upon which cars, carrying material, were moved back and forth. Permanent work had progressed as far as the second pier. On the day before Hedrick's death, Superintendent Roach had ordered Turnham, a foreman to move an engine over the tramway out to a position where it was intended to be used. The next morning, with eight or ten men, Turnham began to execute this order. He took one of his men to the tool house and there he selected a chain which they placed "around the drum of the engine." A rope was attached to this, upon which the men pulled in the effort to move the engine on rollers which were placed under it. After working for some time and getting the engine out a considerable distance, one of the defendants, who was present, sent one of the men up to where deceased and another man were fixing the roadway above referred to, with directions that they come down and help. When they came Roach directed them to go out on the tramway and help with the engine. They went out and were told by the foreman what to do. Just before deceased's death the foreman directed him and the other men to take hold and pull on the rope as he would call out: "Heave-o-heave." They did so, when the chain around the drumhead of the engine broke, precipitating deceased into the river, where he drowned. There was evidence tending to show that the chain was old, worn and badly defective.

Digitized by Google

The reason given by the court for granting a new trial was that it erred in failing to peremptorily direct the jury to return a verdict for the defendants. We therefore only need ascertain whether there was any substantial evidence in plaintiff's behalf; for, if there was, the verdict should not have been disturbed, unless, of course, the law as applied to such evidence deprives plaintiff of a right to recover.

There was evidence tending strongly to show (much of it practically undisputed) that the chain and rope had been attached to the engine and it had been pulled out seventy-five feet before deceased left his road work and came down to the bridge in obedience to the message sent to him by one of defendants. When he got there the superintendent, as already said, directed him to go out on the bridge and help in moving the engine. That he went out and came directly under the orders of foreman Turnham, who testified that he was in charge of the men, including deceased, the latter being under his orders, and that he gave the order to pull on the rope and that he gave that order when the chain broke and let deceased into the river.

Conceding that deceased was a civil engineer and that when called onto this partly constructed work he was made assistant superintendent, will that release defendants from liability under the other evidence? It certainly will not, unless we are prepared to say that an officer of rank, though he performs the labor, cannot be put into or assume the capacity of a laboring servant on the order of his superior. Deceased, though holding such office under defendants' appointment, would not be incapacitated from becoming a common laborer with his coworkers under the direction of a foreman to whom he might be assigned by the order of his superior. In other words, the fact that he was an assistant superintendent did not prevent his descent to the position of a laborer if such was the order of his superior, in which he acquiesced.

Digitized by Google

We have not been cited to a case presenting facts like this; but we have the general announcement of our courts that it is not a question of rank in all cases, but rather one of service, which determines the capacity in which work is being done at a given time. [McGowan v. Railway Co., 61 Mo. 528; Stephens v. Lumber Co., 110 Mo. App. 398.] This was said by this court in the recent case of Madden v. Railway Co., 167 Mo. App. 143, 151 S. W. 489.

It is a part of defendants' support of the rulings of the trial court, that deceased was a volunteer in his help at the rope and they cite Duvall v. Packing Co., 119 Mo. App. 150. But we fail to discover any ground upon which to apply that rule of law. Repeating again, the evidence in plaintiff's behalf shows that one of the defendants ordered him up to this work and that when he came the general superintendent directed him to go out on the tramway and help the others, there engaged under a foreman's direction, and that he did so. He was a volunteer in the sense that he could have refused to go and did not; but not a volunteer in the sense of performing work not his duty to perform and which he had not been ordered to do by his superior.

Defendants next insist that foreman Turnham was a fellow-servant of deceased. That has been answered, indirectly at least, by what we have already written. If deceased in obedience to the order of one of defendants came up to help with the engine and on arrival was directed to go out on the tramway and help move it, there can be no question of fellow-servant, for we have abundant evidence that Turnham was foreman and that deceased took his place as a laborer under his orders.

It is next said that the defendants furnished suitable material at the tool house and if the chain selected was one which was defective and worn out, it was the acts of deceased's fellow-servants. Several cases are

Digitized by Google

cited in support of this; chiefly Forbes v. Dunnavant, 198 Mo. 193, and Bowen v. Railway Co., 95 Mo. 268. But those cases are without application. If a master supplies a mass of material, some good for one part or purpose in a structure and some for another, and the servants make selections from this, their negligence in doing so will be the acts of fellow-servants. But if a foreman in charge of certain work requiring material or appliances, himself selects the appliance as in this case, it is the act of the master himself. Here the chain was selected by the foreman and had been placed around the drum of the engine under the foreman's orders before deceased came to the work. The cases cited by defendants are construed and distinguished by the Supreme Court in Combs v. Construction Co., 205 Mo. 367, and Kennedy v. Gas Light Co., 215 Mo. 688; and by us in Zellars v. Light Co., 92 Mo. App. 107; and by the St. Louis Court of Appeals in Gale v. Mill Co., 159 Mo. App. 639.

The trial court was liberal with defendants in instructions. The facts have been found against them in the light of every legal phase that could be advanced in their behalf. Much of the argument on this appeal has been drawn from the basis of evidence in behalf of defendants, whereas, on a demurrer, we must assume that evidence as discredited, and that for plaintiff, with all reasonable inferences, left standing as the facts.

The judgment will be reversed and the cause remanded with directions to enter judgment for the plaintiff for the amount of the verdict less the remittitur. All concur.

Digitized by Google

THE KANSAS CITY PUMP COMPANY, Respondent, v. CARL VROOMAN, J. D. COOK, et al., Appellants.

Kansas City Court of Appeals, October 6, 1913.

1. **MECHANIC'S LIENS: Notice of Claim: Sufficiency.** V., the general contractor, made a contract with B., a subcontractor, to put the plumbing in a certain building being erected. B. made an arrangement with R. by which the two were to buy the supplies and put them in the building. There was some evidence that a partnership had been formed between S. B. and R. under the name of the Berger Plumbing Co.; but whether there was or not, B. and R. were partners in the purchase of the supplies from plaintiff. They partially installed the supplies in the building and then abandoned the job, and the general contractor finished the installation of the supplies purchased. Plaintiff's lien-claim stated that it was for materials furnished under one entire general contract with "J. R. Riley et al., as Berger Plumbing Company, subcontractors under Carl Vrooman, contractor," and the notice to the owner was that a lien would be claimed for the materials furnished by "J. R. Riley et al. as Berger Plumbing Company, subcontractors under Carl Vrooman, the contractor for making the improvements for you." *Held*, that this notice was sufficient and was not invalid because it did not set out the names of those covered by the "et al." in the notice.

2. ———: ———: **Variance Between Lien Claim and Petition.** Under the above facts there was no variance between the lien claim and the petition.

3. ———: ———: **Partnership.** There being no finding of facts, the appellate court cannot tell whether the trial court found against R. as one of the partners or as a joint subcontractor. But as there was evidence tending to show a partnership or at least a holding out of partnership to plaintiff, it will be presumed that the trial court's judgment was based on the fact of partnership either actual or constructive.

4. ———: **Non-lienable Items in Account.** Where non-lienable items were unintentionally inserted therein, and were easily distinguishable from the rest, and disclaimer was made as to them by plaintiff before judgment and the court struck them out, the inclusion of them in the original account cannot invalidate the lien.

Digitized by Google

Appeal from Jackson Circuit Court.—*Hon. Jas. E. Goodrich,* Judge.

AFFIRMED.

R. E. Rice and *Austin & Davis* for appellants.

New, Kennish and *Krauthoff*, and *John N. Davis,* for respondent.

TRIMBLE, J.—This is a suit to enforce a mechanic's lien upon certain buildings in Kansas City for plumbing supplies furnished by the Kansas City Pump Company purchased of it by B. Berger and J. R. Riley for use in said buildings. The defendant, Carl Vrooman, was the general contractor and the defendant, J. D. Cook, was the owner of the property. It seems that the general contractor, Vrooman, made a contract with Berger, as a subcontractor, to furnish and put in the plumbing, but Berger could not purchase any supplies on his account and made an arrangement with the defendant J. R. Riley by which the two were to buy the supplies and put them in. They went to the Kansas City Pump Company and bought the supplies for the buildings and the same were sold to them and delivered at the buildings by said pump company, but the latter would not sell them to Berger alone and agreed to charge, and did charge them on their books to J. R. Riley. At this time Berger, Riley and Theodore Stegner officed at the same place and some arrangements were made between them, at least between Berger and Riley, to form a partnership under the name of the Berger Plumbing Company. Whether Stegner was ever a member of the partnership or not, there was ample evidence to show that, as to the Kansas City Pump Company, Berger and Riley were partners in the purchase of these supplies. The material purchased was partly installed in the

Digitized by Google

building, but Berger left the country and Vrooman completed the installation of the supplies. After Berger and Riley had abandoned the job, plaintiff presented an order signed by Berger to Vrooman for the amount of the claim and Vrooman, although the entire bill was charged to Riley, agreed to pay same as soon as a garnishment proceeding against him as a debtor of Berger could be disposed of. He made no objection to the order otherwise.

In preparing and filing its lien claim, plaintiff was not able to definitely ascertain who constituted the firm of the Berger Plumbing Company, or whether that organization had been fully perfected, and, therefore, drew up said lien claim for materials furnished by it under one entitre general contract with "J. R. Riley et al., as Berger Plumbing Company, subcontractors under Carl Vrooman, contractor," and notice to J. D. Cook, the owner, was served upon him that a lien would be claimed for the materials furnished by "J. R. Riley et al., as Berger Plumbing Company, subcontractors under Carl Vrooman, the contractor for making the improvements for you." In the petition to enforce the lien, the subcontractors to whom the materials were sold were described the same way, and it was alleged that Berger, Riley and Stegner were copartners. These three, and also Vrooman and Cook, were made parties defendant. Berger had left the State and the court held that the order of publication against him was insufficient to bring him into court. The suit was thereupon dismissed as to him.

The trial court found in favor of the defendant Stegner and rendered judgment against Riley for $253.36 and enforced the lien on the buildings for that amount. Cook, Vrooman, and the holder of an inferior deed of trust appealed.

Appellants urge that the lien notice to the owner Cook was insufficient because it did not name all the

Digitized by Google

persons with whom the contract was made and constituting the firm of the Berger Plumbing Company. The notice recited that the materials were furnished in the premises "under contract with J. R. Riley et al., as the Berger Plumbing Company, subcontractors under Carl Vrooman the contractor for making the improvements for you." The notice to the owner in a mechanic's lien proceeding does not exercise the function of a summons, which is to acquire jurisdiction over the owner. Its purpose is merely to notify him of the claim so that he may investigate it before paying and may protect himself in his settlement with the original contractor. In this case the owner was not misled nor prejudiced nor does he claim to have been. Our courts hold that the lien law is highly remedial and a liberal construction should be given its provisions. [Construction Co. v. Jones, 60 Mo. App. 1; Faulkner v. Bridget, 110 Mo. App. 377, l. c. 381; Bruckner, etc., Co. v. Klein, 100 Mo. App. 289, l. c. 292; Knapp Bros. Mfg. Co., v. K. C. Stock Yards Co., 152 S. W. 119.] The allegation in the petition was not contradicted by the facts. Riley and Berger did purchase materials and they were furnished for and went into the buildings. There was no variance between the lien claim and notice on the one hand, and the petition on the other.

There were no findings of facts asked or given, and we cannot know whether the court found against Riley as one of the copartnership or as one of the joint contractors. There was sufficient evidence from which the court could have found a copartnership at least as between Riley and Berger. Certainly so as regards their relation to plaintiff. There was certainly proof enough to establish a holding out as partners on the part of Riley and Berger. [Citizens Bank v. Lowder, 141 Mo. App. 603.]

There were some nonlienable items in the account, but as they were unintentionally inserted therein, and

Digitized by Google

were easily distinguishable and were separated from the rest of the account, and disclaimer as to them was made by the plaintiff at the trial, and the court struck them out, their inclusion in the account could not invalidate the lien. [Darlington Lumber Co. v. Pottinger, 165 Mo. App. 442; Eau Claire St. Louis Lumber Co. v. Gray, 81 Mo. App. 337.]

The evidence was sufficient to sustain the judgment rendered. In the absence of any findings of fact we must presume the case was tried on the correct theory. The plaintiff sold the materials with the understanding that they were to be used in the buildings, and delivered the materials there, and they were therein actually used. The original contractor was fully aware of the situation and made use of the materials, and both he and the owner were not misled in any way. The judgment should be affirmed. It is so ordered. All concur.

HARRY WALMSLEY, Appellant, v. A. C. STOWELL and C. D. STOWELL, Respondents.

Kansas City Court of Appeals, October 6, 1913.

MONEY HAD AND RECEIVED: Voluntary Advancements. Plaintiff, acting as an insurance broker, placed some insurance for a client with another insurance agent. It was a custom of these two having mutual dealings with one another to settle at the end of the month, the one owing the larger amount paying the other the difference between the two accounts. At the end of the month the insurance agent settled with plaintiff deducting the amount of the premiums due on the insurance from the amount due plaintiff. To this plaintiff made no objection. Before plaintiff could collect the amount of the premium from his client, the client died. The insurance companies carrying the insurance afterward went into the hands of receivers, and the agent paid all premiums in his hands to the receivers, including the premium so paid by plaintiff.

Digitized by Google

After the death of the client, plaintiff attempted to collect the amount advanced in premiums from his client's estate, but the probate court denied his claim, and thereupon plaintiff brought this suit against the agent. *Held*, that the money was voluntarily advanced by plaintiff to pay for his client's insurance, and, since the agent to whom it was advanced had paid it over to the receivers, he could not recover it from the agent on the ground that the insurance was worthless, or on the ground that the agent had appropriated it without plaintiff's consent.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas,* Judge.

AFFIRMED.

J. H. Bremmermann for appellant.

H. L. Green for respondents.

TRIMBLE, J.—This suit was instituted before a justice of the peace to recover of defendants the sum of $40.15 with interest. A man by the name of Graham, in Excelsior Springs, applied to one Morse, for insurance on certain property there. Morse applied to plaintiff Walmsley, an insurance broker in Kansas City, to procure the insurance for Graham. Walmsley placed a part of the insurance with defendants, as agents of a western insurance company, and the rest with Fowler & Sons as agents of other companies. Policies from all these companies were issued by the respective agencies representing each.

It seems that there is a custom among the insurance agents of Kansas City, where insurance has been placed by them in each other's companies, to have a settlement at the end of the month, and for the one that owed the other a balance on that month's business to settle it by sending the other a check for such balance. At the close of the month, defendants, in settlement of the business between them and Walmsley, took out of the amount they owed him, the amount of the Graham insurance premium and sent him a check for the bal-

Digitized by Google

ance. Walmsley made no objection to this at the time. Before Graham paid any of the premiums, he died and the property burned and the companies in which it was insured went into the hands of receivers and could pay nothing on the insuracne. Walmsley then attempted to collect the premiums from the Graham estate, but as the insurance was worthless, the probate court decided against Walmsley's claims. He then demanded of defendants payment of the amount of such premiums they had received from him, but, as they had paid them over to the receivers of the company they represented, they declined to return the money. The case was appealed from the justice court to the circuit court where a jury was waived and a trial had by the court, and judgment rendered for the defendant, and plaintiff appealed.

Appellant bases his right to recover on the proposition that, as respondent took the amount of the premiums out of the money they owed to appellant, they did so without appellant's consent, and therefore, respondents are liable as for money had and received. There were no declarations of law or findings of fact asked or given. Hence we do not know precisely on what facts or theory the court found for defendant. Nor can we tell just when the insurance companies failed. But the evidence does show that in placing the insurance with respondents, appellant Walmsley was acting as agent for Graham. Respondents insured the property and took the premiums due thereon out of money belonging to Walmsley with his knowledge and to which he did not object. Walmsley, therefore, in effect, voluntarily paid to respondents the premium for and on behalf of Graham and then attempted to recover it from Graham's estate. In the meantime the receivers had collected this money from respondents so advanced by Walmsley, and hence it was the same as if Walmsley had advanced directly to the company enough money to pay Graham's pre-

Digitized by Google

mium, and the company, by reason of insolvency, was unable to return it. That respondents did not appropriate appellant's money to the payment of said premiums without his consent is shown by appellant's statement on which suit was brought, as it reads "to amount advanced three years ago on Graham insurance at Excelsior Springs, Missouri, Walla Walla, premium, with three years interest at six per cent."

If he *advanced* it, he must have done so for and on behalf of Graham. And having advanced it, the respondents cannot be said to have appropriated it without his authority or consent. And when he advanced it to the agents it became money in the agent's hands belonging to the company which the receivers could compel the agents to turn over to them. The judgment is for the right party and is, thereofre, affirmed. All concur.

WILLIAM JACKSON, Respondent, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

St. Louis Court of Appeals, May 6, 1913.

1. **TELEGRAPHS AND TELEPHONES: Error in Transmitting Message: Negligence.** Proof of error in transmitting a telegram makes out a prima facie case of negligence on the part of the telegraph company.

2. **———: ———: Right of Recovery: Facts Stated.** Plaintiff's agent wired plaintiff, on February 28, 1909, that wool could not be purchased for less than twenty-one and one-half to twenty-two cents per pound. Plaintiff, on March 1, wired, in response to this message, that the agent should not pay to exceed twenty-one cents per pound. This message was erroneously transmitted so as to authorize the payment of twenty-two cents per pound, and the agent bought a quantity of wool at this figure on March 2. In an action against the telegraph company, *held* that the agent's telegram concerning the price at which wool could be bought on February 28 was not con-

Digitized by Google

clusive as to what the market value was on March 2; *held, further*, that the agent was justified in buying wool at twenty-two cents per pound, upon the receipt of the erroneously transmitted telegram, although, by continuing negotiations with the sellers, he might have bought at a lower figure; and hence it is *held*, that defendant is liable for the difference between the amount paid by the agent for the wool bought and the market value thereof on the day and at the place of the purchase.

3. ———: ———: **Measure of Damages: Evidence.** In an action for damages caused by erroneously transmitting a telegram authorizing plaintiff's agent to pay twenty-two, instead of twenty-one, cents a pound for wool, evidence was admissible as to the market value of wool at the place of purchase on the day the telegram was sent; the measure of damages being the difference between the market value of the wool at the time and place of the purchase and the higher price paid by plaintiff's agent because of the error in transmission.

4. ———: ———: **Damages: Market Value: Sufficiency of Evidence.** In an action for damages caused by erroneously transmitting a telegram authorizing plaintiff's agent to pay twenty-two, instead of twenty-one, cents a pound for wool, evidence that actual sales were made at the place in question at twenty-one cents per pound two days later than the day on which plaintiff's agent purchased at twenty-two cents, and at slightly less than that three days later, and at twenty cents two or three days before, was sufficient to establish the market value at the time and place in question.

5. **INSTRUCTIONS: Defects and Omissions: Cure by Other Instructions.** An instruction, in an action for damages caused by the erroneous transmission of a telegram authorizing the purchase of wool for plaintiff at twenty-two, instead of twenty-one, cents a pound, that the jury should find for plaintiff if they believed that an error was made in transmitting the telegram, in that, as delivered, it read twenty-two cents instead of twenty-one cents, was not reversible error for not including all of the elements essential to recovery, in view of the defenses, where the defendant's theory was fully covered by instructions given on its behalf, since, in determining the correctness of an instruction, the whole charge should be considered.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

AFFIRMED.

Digitized by Google

Ferriss, Zumbalen & Ferriss for appellant.

(1) Evidence of what might, should or could have taken place under conditions which never existed is too uncertain and speculative to constitute the basis of a finding of damages. Rimel v. Hays, 83 Mo. 200; Rutledge v. Railroad, 110 Mo. 312; Reynolds v. Telegraph Co., 81 Mo. App. 223; Baldwin v. Telegraph Co., 45 N. Y. 744; Hosiery Mills v. Tel. Co., 123 Ga. 216; Lumber Co. v. Telegraph Co., 52 W. Va. 410; Tanning Ext. Co. v. Railroad, 143 N. C. 376; Smith v. Tel. Co., 83 Ky. 104; Hughes v. Tel. Co., 114 N. C. 70; Telegraph Co. v. Watson, 92 Ga. 202. The needed certainty cannot be supplied by testimony as to "market value" where as here, the facts show that there was not and could not be any "market value," within the accepted meaning of that phrase. 19 Am. & Eng. Ency. 1153. (2) It is an agent's duty to exercise the utmost good faith and fidelity in dealing with his principal; to obey the latter's instructions, to advise him of facts relevant to the matters in hand, to display reasonable care and diligence as well as ordinary intelligence in handling his business. 31 Cyc. 1456; 1 Am. & Eng. Ency. 1063, 1069, 1071; Holmes v. Cathcart, 60 L. R. A. 734. Where defendant's fault or negligence is the remote cause and plaintiff's or his agent's or a third party's subsequent fault or negligence or some efficient intervening act is the direct and proximate cause of plaintiff's loss, the defendant is not liable. 37 Cyc. 1757; Logan v. Railroad, 96 Mo. App. 465; Reynolds v. Telegraph Co., 81 Mo. App. 223; Commission Co. v. Telegraph Co., 101 Mo. App. 500; Tel. Co. v. Briscoe, 18 Ind. App. 22; Higdon v. Tel. Co., 132 N. C. 726; Lowery v. Tel. Co., 60 N. Y. 198; Tel. Co. v. Cornwell, 2 Colo. App. 491. (3) An instruction which assumes to direct a verdict for plaintiff must include all the elements in the case essential to his right of recovery. Error in plaintiff's instructions

Digitized by Google

is not cured by correct instructions given for defendant, where the two sets are inconsistent. Sheperd v. Transit Co., 189 Mo. 362; Brokerage Co. v. Gates, 190 Mo. 391; State v. Helton, 234 Mo. 559; Hamilton v. Railroad, 114 Mo. App. 504; Smith v. Railroad, 126 Mo. App. 120; Haynor v. Water Co., 129 Mo. App. 691; Ross v. Railroad, 132 Mo. App. 473; Russell v. Poor, 133 Mo. App. 723; Kelly v. United Ry. Co., 153 Mo. App. 114.

Nagel & Kirby and *E. G. Curtis* for respondent.

(1) Proof of a mistake in a telegram makes a prima facie case of negligence on the part of the telegraph company, and in the absence of any proof to the contrary, the only question then open is that of the measure of damages. Reed v. Telegraph Co., 135 Mo. 661; Hughes v. Telegraph Co., 79 Mo. App. 133. (2) Market value may be established by proof of sales of the same character of property at or about the time of the sale in question and also by expert testimony. Reilly v. Cullen, 101 Mo. App. 32; Johnson-Brinkman Com. Co. v. Wabash, 64 Mo. App. 590; Cliquot v. U. S., 3 Wall. 114; Theiss v. Weiss, 166 Pa. St. 9; Douglas v. Merceles, 25 N. J. Eq. 144; Parmentier v. Fitzpatrick, 135 N. Y. 190. (3) A single instruction need not cover the whole case, but all the instructions should be read together and even an omission in plaintiff's instructions may be cured by defendant's. Lange v. Railroad, 208 Mo. 458; Anderson v. Union Terminal Railway, 161 Mo. 411; Meadows v. Life Ins. Co., 129 Mo. 76; Hughes v. Railroad, 127 Mo. 447; Owens v. Railway, 95 Mo. 169; McCloskey v. United Railways, 162 Mo. App. 232; Hales v. Raines, 146 Mo. App. 232; Reding v. Reding, 143 Mo. App. 659; Shores v. City, 134 Mo. App. 9; Shanahan v. Transit Co., 109 Mo. App. 228.

Digitized by Google

ALLEN, J.—This is an action for damages alleged to have been suffered by plaintiff by reason of the negligent transmission by defendant of a telegram from St. Louis, Missouri, to Wibaux, Montana. Plaintiff recovered and defendant prosecutes the appeal.

Plaintiff is a dealer in wool in the city of St. Louis, and one C. M. Dinsdale, of Wibaux Montana, was his agent for the purchase of wool, i. e., to contract in advance with wool growers for their crops of wool to be clipped and delivered later. On or about February 28, 1909, plaintiff received from his said agent, at Wibaux, a telegram as follows:

"Twenty cents has been offered and refused. Nothing less than twenty-one and a half to twenty-two cents would buy the best clips. Answer.

"C. M. DINSDALE."

In reply to this message plaintiff on March 1, 1909, wrote, and delivered to the defendant, the following telegram for transmission to the agent at Wibaux, viz.:

"Telegram received, prices quoted out of all reason provided you can buy absolutely the choicest clips with tags allowance with guarantee free of spear grass inserted on contract you may pay twenty-one be conservative only choicest clips wanted absolutely.

"WILLIAM JACKSON."

This telegram as actually transmitted, and delivered to the agent at Wibaux, March 2, 1909, was as follows:

"Telegram rec'd prices quoted out of all reason provided you can buy absolutely the choicest clips with tag allowance and with guarantee free spear grass instruct on contract you may pay *twenty-two* be conservative only choicest clip wanted absolutely.

"WILLIAM JACKSON."

The evidence disclosed that, relying upon this telegram, plaintiff's agent at Wibaux, Montana, contracted for the purchase by plaintiff of four crops of

Digitized by Google

wool on said March 2, 1909, at twenty-two cents per pound. It appears that there was no regular exchange or board of trade at or near Wibaux, Montana, where quotations of the prices of wool were made, but that wool buyers were in the habit of meeting there about the time of the year that this transaction took place, for the purpose of negotiating with wool growers in that vicinity for the purchase of their wool; the custom being to purchase the entire crop of wool while the same was growing upon the backs of the sheep, for future delivery when ready to be clipped. There was evidence that market conditions in the East, and instructions from dealers there, largely govern the action of the wool buyers, who purchase as agents for such dealers.

There was testimony of so-called experts, familiar with the prices of wool at the time in question, that the market value of wool at Wibaux, Montana, on March 2, 1909, was from twenty to twenty-one cents per pound. Plaintiff's testimony showed that sales of wool of the character here in question were made on March 4, 1909, at twenty-one cents per pound, and on March 5, 1909, at twenty and one-eighth cents per pound; and that two or three days prior to March 2d, wool was sold at twenty cents per pound. From the evidence, there appears to be no standard by which to arrive at the market value of wool, at the time and place, other than by the prices at which sales were there made at or about this time. It appears that the buyers negotiated or dickered with the owners, and the price paid for any crop depended upon the bargain made; some owners accepting one price, and others holding out for a time for a higher figure.

The evidence showed that plaintiff did not suffer an actual loss on the lot of wool purchased at twenty-two cents per pound; that is to say, plaintiff sold the wool at some profit. The suit proceeds upon the theory that plaintiff is entitled to recover the additional

Digitized by Google

profit of one cent per pound which he would have made had the wool been purchased at twenty-one cents per pound instead of twenty-two cents.

The defendant offered no evidence. The jury returned a verdict for plaintiff for $966; for, although plaintiff's evidence went to show that, in reliance upon the telegram, 97,762 pounds of wool had been purchased by the agent at twenty-two cents per pound, plaintiff nevertheless in his petition prayed judgment for only $966.

The only assignments of error requiring consideration pertain to the overruling of a peremptory instruction offered by defendant, to the effect that plaintiff could recover only nominal damages, and the giving of instructions requested by plaintiff.

I. It does not appear to be disputed that proof of defendant's error in transmitting the telegram makes out a prima facie case of negligence on its part. [Reed v. Western Union Telegraph Co., 135 Mo. 661, 37 S. W. 904, and cases cited; Hughes v. Western Union Telegraph Co., 79 Mo. App. 133.] And as defendant offered no explanation, the only question remaining open pertained to the measure of damages. Appellant insists that the instruction offered by it, to the effect that plaintiff could recover only nominal damages, should have been given.

As appellant's argument proceeds, plaintiff failed to make a case entitling him to anything more than nominal damages, for the reason, as is said, that plaintiff's case, with respect to actual damages suffered, rests purely upon conjecture and speculation. It is urged that if twenty-two cents per pound was the lowest price at which the wool could have been purchased, then plaintiff sustained no loss in the premises; for in that event, even had the message been correctly transmitted, the agent would not have been able to purchase any wool. And appellant says that plaintiff cannot recover upon the theory that his agent

Digitized by Google

might have purchased at twenty-one cents but for the mistake in sending the telegram, for the reason that what the agent might have done is purely a matter of speculation; and furthermore that the agent's telegram to the plaintiff, above set out, shows that wool of the grade in question could be purchased only at twenty-one and one-half to twenty-two cents per pound.

And appellant insists that plaintiff cannot recover by showing that the market value of wool at the time and place in question was twenty-one cents per pound. This for the reason that there was no way, as appellant says, to definitely determine the market value; and for the further reason that proof that the market value was twenty-one cents per pound destroys plaintiff's claim for damages, for the reason that if this was the market value of the wool and the latter could have been purchased by plaintiff's agent at this figure, then there was no occasion for paying more, and it was the agent's own negligent act, in paying twenty-two cents, that was the proximate cause of plaintiff's loss, and not the error in transmitting the telegram.

We are not persuaded, however, that this argument advanced by learned counsel for appellant is sound. In the first place, the defendant stands chargeable with negligence to which plaintiff's loss may be fairly attributed, and we think it does not lie in the mouth of defendant to say, in effect, that plaintiff's agent should have known better than to rely upon the erroneous telegram. In whatever light the transaction may be viewed, there appears to be ample evidence to justify the submission to the jury of the question of plaintiff's right to recover substantial damages. It is perfectly clear that plaintiff did not intend to authorize his agent to purchase at a price higher that twenty-one cents per pound. It is true that the agent's telegram indicates that the wool could not be

Digitized by Google

purchased at a figure quite so low at the time that telegram was sent, but this is by no means conclusive as to what the market value was on or about March 2d, if the question before us is to depend upon the market value.

So far as concerns the action of plaintiff's agent in paying twenty-two cents a pound for the wool, pursuant to the authority given him by the spurious telegram, we must view this in the light of the attendant circumstances. The evidence disclosed that Dinsdale was an agent buying for plaintiff on commission. He was negotiating with wool growers for the purchase of their crops of wool, and he and the growers were dickering over the price to be paid. Naturally the growers were interested in getting the highest possible prices. The agent offered twenty cents per pound, which was refused. At this stage of the negotiations he sent to his principal the telegram quoted above. Upon receiving a reply authorizing him to pay twenty-two cents a pound, he was justified in closing the negotiations at any price not above that figure. It cannot be said that he should have waited and continued negotiations, even though he may thereby have been able to purchase at a lower figure. He was within the authority conferred upon him by the telegram, and the evidence does not disclose any ground upon which the defendant may rightfully question what he did in reliance thereupon.

We think it was proper to allow plaintiff to show what the market value of wool was at Wibaux, Montana, on or about the day in question. In fact as we view the case the measure of damages must depend upon the market value.

In McCarty et al. v. W. U. Tel. Co., 116 Mo. App. 441, 91 S. W. 976, the action was for negligence in transmitting a telegram concerning the sale of some mules. The plaintiffs had offered to sell the mules to one Pendleton for $135. The purchaser did not then

Digitized by Google

agree to take them, but that evening delivered to the defendant a telegram directed to the owners as follows: "Will give one thirty for mules." This message was transmitted and delivered as follows: "Will leave one thirty for mules." Plaintiffs, on receiving the telegram, inferred that the purchaser had decided to take the mules at $135 each, and delivered the mules to him. There was evidence that the market value of the mules at the time and place in question was $135 per head. As to the damages recoverable, this court, through BLAND, P. J., said:

"The plaintiff has a right to be placed in the same position he would have been in had defendant's agents correctly transmitted the telegram. Had this been done the mules would not have been delivered to Pendleton and the presumption is that plaintiffs would have been able to have sold the mules at what the evidence shows was their market value at Clarence, one hundred and thirty dollars per head. Their loss or damage therefore was five dollars on each mule."

In other words, plaintiffs were there the sellers, and were allowed to recover the difference between what was shown to be the market value of the thing sold and the lower price at which it was sold because of the spurious telegram. In the case before us, the plaintiff is the purchaser, having, on account of the erroneous telegram, paid a price higher than what the evidence shows to have been the market value. No good reason is perceived why his measure of damages should not be the difference between the market value of the thing purchased and the higher price paid because of the error in transmitting the telegram.

In Reed v. W. U. Tel. Co., supra, the action was for negligence in transmitting a telegram sent by plaintiff's agent to her in respect to the sale of certain real property. As written and delivered, the telegram advised plaintiff that an offer of $1300 had been made for the property. As transmitted and delivered,

Digitized by Google

the telegram read $1900. In reliance upon the telegram, plaintiff forwarded a deed, and the property was sold by her agent, and she sued to recover the damages sustained. There was evidence that the market value of the property was $1900. The court through GANTT, P. J., said:

"But it is urged that even if defendant is liable for negligence under the circumstances, still the loss of the difference between the price received and the actual market value of the lot is not the proximate result of that negligence, in other words is not the natural and reasonable consequence of defendant's mistake, and the principle is invoked that no one can recover damages which he can avoid by diligent effort upon his own part.

"Let us examine this view of the case . . . . In this way plaintiff was lead to believe she was offered $1900 for her property. Being willing to part with it for that sum she wired acceptance of the proposition made. The proposal was only $1300, but in this way she was made to accept that proposal. Her agent was clothed not only with apparent but actual authority to sell for $1300 so far as he was advised. Being thus empowered to sell, he made a binding contract and accepted a part of the purchase money. The deed was forwarded and he delivered it. All this was done upon reliance on the correctness of defendant's action. Could a more natural consequence ever follow a transaction than this loss did upon the mistake of defendant? Does it lie in defendant's mouth to speculate how plaintiff or her agent by the exercise of care which it failed to exercise might have avoided her contract with the purchaser?"

Here we think the presumption should be indulged that but for the erroneous telegram, plaintiff could have purchased the wool, at or about the time in question, for its market value. And the latter furnishes

Digitized by Google

the only basis by which to intelligently determine plaintiff's damages in the premises.

II. The next question arising, then, is whether the evidence was sufficient to establish the market value of the thing sold at the time and place in question. It appeared from the evidence that actual sales were made at twenty-one cents two days later, and at slightly less than that figure three days later, and that two or three days before March 2d, wool sold as low as twenty cents per pound. No other way appearing to determine the market value, we think it clear that this evidence is sufficient to take the question to the jury, and that, in the absence of other evidence pertaining thereto, a verdict may be based thereupon. [See Permertier v. Fitzpatrick, 135 N. Y. 190; Cliquot v. U. S., 3 Wall. 114; Douglas v. Merceles, 25 N. J. Eq. 144; Reilly v. Cullen, 101 Mo. App. 32, 74 S. W. 370.]

III. On behalf of plaintiff, the court instructed the jury that if they believed from the evidence that an error was made by defendant in transmitting and delivering plaintiff's telegram to his agent, in that said message as delivered read twenty-two cents instead of twenty-one cents, then their verdict should be for the plaintiff. Then follows an instruction as to the measure of damages. Appellant contends that it was error to give the above instruction, directing a verdict for plaintiff, in that it did not include all the elements in the case essential to plaintiff's right to recover, in view of the defenses relied upon. As to this question, it is sufficient to say that defendant asked and the court gave instructions covering defendant's theory of the case fully. The argument advanced is that, although this is true, nevertheless the giving of defendant's instructions does not cure the alleged error in the instruction given for plaintiff. This con-

Digitized by Google

tention is unsound. The instruction for plaintiff above referred to authorized a recovery (of at least nominal damage) because of the error in transmitting the telegram. This, as we have seen, is correct; for defendant's error, unexplained as it was, made a prima facie case against it. And there was no reversible error in giving the instruction in the form in which it was given, since the very things which defendant claims should have been included in that instruction were placed before the jury in instructions given for defendant. The instructions must all be read together before condemning one for such an omission. [Meily v. Railroad, 215 Mo. l. c. 589, 114 S. W. 1013; Lange v. Railroad, 208 Mo. l. c. 477, 106 S. W. 660; Hughes v. Railroad, 127 Mo. l. c. 452, 30 S. W. 127; Meadows v. Life Ins. Co., 129 Mo. l. c. 97, 31 S. W. 578; Owens v. Railroad, 95 Mo. l. c. 181, 8 S. W. 350; Johnston v. Railroad, 150 Mo. App. l. c. 323, 130 S. W. 413; Wright v. Mining Co., 163 Mo. App. 536, 147 S. W. 213.]

For the reasons given above the judgment of the circuit court is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

GEORGE H. BACKER, Appellant, v. SEABOARD FIRE & MARINE INSURANCE COMPANY. Respondent.

St. Louis Court of Appeals, May 6, 1913.

1. **TRIAL PRACTICE: Separate Findings of Fact and Law: Refusal.** In an action at law, the refusal of the trial court, upon due request therefor, to state in writing the conclusions of fact found separately from the conclusions of law, as required by Sec. 1972, R. S. 1909, is reversible error.

2. **———: ———: ———: Equity Case.** The trial court's failure to make separate findings of fact and conclusion of law on request, as required by Sec. 1972, R. S. 1909, is not reversible error in an equity case.

Digitized by Google

3. ———: ———. The trial court cannot be required to give declarations of law and also to make findings of fact and conclusions of law under Sec. 1972, R. S. 1909, but it is required to do one or the other upon due request therefor.

4. ———: ———. Where, after a demand for a separate statement of conclusions of fact and law had been made by plaintiff, the court requested counsel to submit suggestions for such findings, and the suggestions submitted were rejected, the fact that such suggestions were submitted would not deprive plaintiff of his right to have the court make a separate statement of conclusions of fact and law in compliance with Sec. 1972, R. S. 1909.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen,* Judge.

REVERSED AND REMANDED.

H. A. & C. R. Hamilton and *S. C. Taylor* for appellant.

If one of the parties requests the court to state its findings of fact and conclusions of law, it is the duty of the trial court so to do. The failure or refusal to make such findings in a legal action constitutes reversible error. R. S. 1909, sec. 1972; Loewen v. Forsee, 137 Mo. 29; Miller v. McCaleb, 208 Mo. 562; Fahy v. Grocer Co., 57 Mo. App. 73; Hamill v. Talbott, 72 Mo. App. 22; Bailey v. Emerson, 87 Mo. App. 220; Gaines & Co. v. Grocer Co., 107 Mo. App. 507; Stewart v. Grain Co., 163 Mo. App. 473.

Charles B. Obermeyer and *George L. Edwards* for respondent.

ALLEN, J.—This is a suit upon a policy of fire insurance issued by defendant company. Plaintiff is the trustee in a deed of trust covering the building insured and the plot of ground upon which it was situated. Attached to the policy is the usual mortgage clause, making the loss, if any, payable to the plaintiff

Digitized by Google

trustee, as his interest may appear. The cause was tried before the court without a jury, resulting in a judgment for defendant, and plaintiff appeals. In the view that we take of the appeal it is unnecessary to state the facts relating to the merits of the controversy.

During the trial, and before the cause was submitted, the plaintiff, with the view of excepting to the decision of the court upon the questions of law arising in the case, requested the court to state in writing "the conclusions of facts found separately from the conclusions of law," in accordance with the provisions of section 1972, Revised Statutes 1909. The court thereupon asked plaintiff's counsel to submit suggestions for such finding of facts and conclusions of law in accordance with plaintiff's request; and in compliance therewith counsel for plaintiff submitted certain suggestions for the consideration of the court in the premises. The cause was thereupon taken under advisement by the court, and thereafter the court refused to adopt the suggestions of plaintiff's counsel, and without making any statement of its finding of facts or conclusions of law, entered a general judgment for the defendant. Plaintiff duly preserved an exception to the action of the court in failing to comply with the above mentioned statute.

We do not enter into the merits of the controversy for the reason that, in our judgment, the case must be reversed for error on the part of the court in failing, upon due request made therefor, to make a finding of facts, stating separately its conclusions of law, as required by the statute.

Section 1972 of the Revised Statutes 1909 provides as follows:

"Upon the trial of a question of fact by the court it shall not be necessary for the court to state its findings, except generally, unless one of the parties thereto request it with the view of excepting to the decision

Digitized by Google

of the court upon the questions of law or equity arising in the case, in which case the court shall state in writing the conclusions of facts found separately from the conclusions of law."

Under this statute it was imperative that the court, upon request, make, in writing, a finding of facts, and state separately its conclusions of law. The court was not bound, of course, to adopt the suggestions made by plaintiff's counsel in respect thereto, but it could not avoid the necessity of complying with the statute. Its duty in the premises was plain. Had the case been one in equity, the failure of the court to follow the statute would not have been reversible error. [See Miller v. McCaleb, 208 Mo. l. c. 574, 575, 106 S. W. 655; Shaffer v. Detie, 191 Mo. l. c. 387, 90 S. W. 131; Fitzpatrick v. Weber, 168 Mo. l. c. 572, 68 S. W. 913; Gaines & Co. v. Grocery Co., 107 Mo. App. l. c. 532, 81 S. W. 648.]

In an action at law, tried before the court without a jury, where a request is made by either of the parties to the suit, before judgment, for the court to state in writing its conclusions of facts found separately from its conclusions of law, as the statute provides, it is the duty of the court so to do. [See Kostuba v. Miller, 137 Mo. l. c. 173, 38 S. W. 946; Cochran v. Thomas, 131 Mo. l. c. 267, 33 S. W. 6; Brinson-Judd Grain Co. v. Becker, 76 Mo. App. l. c. 379; T. J. Moss Tie Co. v. Kuilich, 80 Mo. App. 304; Bailey v. Emmerson, 87 Mo. App. 220; Stewart v. Grain Co., 163 Mo. App. l. c. 486, 143 S. W. 868.]

The requirement of the statute is said to be that the court shall state in writing, "not only every constitutive fact in issue to which his attention is directed, but also separately the conclusions of law thereon in order that exceptions may be taken thereto" (Cochran v. Thomas, supra), and that this is required "in order that the theory of law upon which the case

Digitized by Google

was tried may be made apparent, as well as how the court found the facts." [Kostuba v. Miller, supra.]

Respondent urges that the court may be required to give or refuse declarations of law on the one hand, or to make a finding of facts with its conclusions of law on the other, but that it cannot be required to do both. In this respondent is correct. [See Stewart v. Grain Co., supra; T. J. Moss Tie Co. v. Kreilich, supra; Kostuba v. Miller, supra.] But this avails the respondent nothing in this case, for plaintiff below did not seek to have the court do both. Plaintiff did not ask declarations of law, but requested the court to state its conclusions of fact and of law separately; the very thing which the statute requires the court to do upon such request being made. In compliance with a request made by the court, counsel for plaintiff did, it is true, submit in writing certain findings of fact and conclusions of law, which the court saw fit to reject. This could not deprive the plaintiff of his right to have the court make a proper statement thereof, in writing, in compliance with the statute.

The further contention is made by respondent that the statement of facts need embrace only the constitutive facts which are not admitted by the pleadings or about which there was no controversy at the trial, citing Fahy v. Grocer Co., and Bailey v. Emmerson, supra; and it is urged that the substantive or constitutive facts in this case are either admitted by the pleadings or are established by uncontroverted evidence, and hence there was no necessity for the court to make any finding of facts. We think, however, that what was said in these cases has no application here. This for the reason that in both cases the trial court made a finding of facts (though in the Bailey case there was no request therefor), and the question on appeal pertained to the sufficiency of such finding. In the case before us, the court made no statement of its finding of facts or conclusions of law whatsoever, though re-

Digitized by Google

quest therefor was made by plaintiff, but simply entered a general judgment, finding the issues in favor of the defendant. Having in view the purposes of the statute, as indicated above, we are of the opinion that the action of the court in so doing is reversible error. It does not appear that all the facts are admitted by the pleadings; there are objections in the record which were not passed upon at the trial, and as to which the court appears to have reserved its rulings in taking the case under advisement; and the court rejected the suggestions for a finding of facts submitted by plaintiff's counsel, refusing to adopt the same as a statement of facts in the case. We think that it cannot be said that the facts were wholly beyond dispute; and it is certain that the record does not show the theory of law upon which the court based its decision. In our opinion the plaintiff had a clear legal right to have a finding of facts made, and to have the court state separately its conclusions of law thereon.

The judgment must be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

TONY FINUTA, Appellant, v. AMERICAN MANUFACTURING COMPANY, Respondent.

St. Louis Court of Appeals, May 6, 1913.

1. **MASTER AND SERVANT: Injury to Servant: Liability of Master.** A revolving cylinder of a jute separating machine, to which was attached knives, was completely covered by a guard, except a slit, about one inch wide and extending the length of the cylinder, into which the jute was fed. Plaintiff, an employee, was ordered to clean the machine, and in an endeavor to remove, with his hand and while the cylinder was revolving, jute which had fallen into the slit, his hand came in contact with the knives and was injured. *Held*, that whether the master, by the exercise of reasonable prudence, could have foreseen injury would happen to the servant by

Digitized by Google

reason of the cylinder being in motion while he was cleaning the machine, is a matter of doubt.

2. ———: ———: **Duty of Master.** The master is required to use only such reasonable precautions to prevent accidents to his employees as would have been adopted by prudent persons prior to the accident.

3. ———: ———: **Contributory Negligence.** A revolving cylinder of a jute separating machine, to which was attached knives, was completely covered by a guard, except a slit, about one inch wide and extending the length of the cylinder, into which the jute was fed. Plaintiff, an employee, was ordered to clean the machine, and in an endeavor to remove, with his hand and while the cylinder was revolving, jute which had fallen into the slit, his hand came in contact with the knives and was injured. *Held*, that the slightest care or observation by plaintiff would have disclosed to him that the cylinder was revolving and that it was dangerous for him to put his hand into the slit, and hence he was guilty of contributory negligence, barring a recovery for his injuries.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

AFFIRMED.

John J. O'Connor for appellant.

(1) Defendant was guilty of negligence toward plaintiff in requiring plaintiff to clean the carding machine while the cylinder thereof was in motion, without warning, when it knew, or by care could have known, that he was ignorant of the operation of the machine, and not likely to discover that the cylinder was in motion and therefore likely to sustain injury to his hands. And this negligence was largely enhanced by the action of defendant's foreman, who, in the presence of plaintiff, stopped the feeder, thus beguiling plaintiff into the belief that the whole machine was stopped. Radtke v. Basket & Box Co., 229 Mo. 14. (2) In a master and servant case where there is any substantial evidence in support of the allegation of negligence on the master's part which produced the

Digitized by Google

servant's injury, the cause should go to the jury. Hach v. Railroad, 208 Mo. 601; Bennett v. Lime Co., 146 Mo. App. 565; Panos v. Car & Foundry Co., 147 Mo. App. 574; Strobel v. Manufacturing Co., 148 Mo. App. 22; Knapp v. Hanley, 108 Mo. App. 360. (3) Plaintiff did not assume the risk of cleaning the machine while the cylinder thereof was in motion, for he did not know that it was in motion, but even if he did, he still might have done the cleaning without being guilty of such contributory negligence as would preclude his right to recover. Dakan v. Chase & Son M. Co., 197 Mo. 266; Blanton v. Dold, 109 Mo. 75; Settle v. Railroad, 127 Mo. 342; Pauck v. Beef Co., 159 Mo. 477; Wendler v. Peoples H. F. Co., 165 Mo. 527; Coal v. Railroad, 183 Mo. 94.

Percy Werner for respondent.

ALLEN, J.—This is an action for personal injuries received by plaintiff in the course of his employment as a servant of defendant. Plaintiff suffered a nonsuit below, and after unsuccessfully moving to set the same aside, has appealed to this court.

At the time plaintiff received his injuries, he was employed as a laborer in defendant's factory. He had been in defendant's employ about two months, and for some three weeks prior to receiving the injury in question, had been engaged in carrying jute, or like materials, to one of defendant's machines, into which the same was fed by a conveyer. The jute was thrown on the conveyer which carried it to a cylinder, where it was picked apart and the fiber separated by knives or "pins" attached thereto. The cylinder was completely covered by a "drum," as a guard, except for a slit about one inch wide, extending the length of the cylinder, into which the material was fed by the conveyer. On the day upon which plaintiff was injured, he was ordered by the foreman in charge of defend-

Digitized by Google

ant's factory to clean this machine, and while engaged in sweeping off the drum with a broom, some jute got into this lit, and in attempting to remove the jute with his left hand, the latter was caught by the knives or pins of the cylinder and the third and fourth fingers thereof were cut and mangled.

The petition alleges that plaintiff was ordered to clean the machine while the cylinder was in motion, and without warning that the latter was so in motion, and without plaintiff knowing the same; that plaintiff had no knowledge of the manner in which the machine was operated, and no means of knowing whether or not it was in motion, or of the danger of cleaning it while in motion; "that while he was cleaning said machine in obedience to said order, and for the purpose of removing the dirt from the slit in the side of the cover of said drum he placed his left hand therein," whereupon he was injured. And it is averred that his said injuries were caused by the negligence of defendant in requiring him to clean the machine while the cylinder thereof was in motion, without giving him warning that it was in motion and of the danger "of putting his hand in the slit."

The answer is a general denial, coupled with a plea of contributory negligence whereby it is averred that plaintiff's injuries were sustained by reason of his own negligence, directly contributing thereto, in inserting his fingers under the cover surrounding the revolving cylinder of the machine, "needlessly and unnecessarily, and while he knew, or, by the exercise of ordinary care, might have known that the cylinder was revolving and that his fingers were liable to come in contact with said cylinder or the projecting pins thereof."

The evidence discloses that the cylinder to which the knives or pins were attached, and which injured plaintiff, was driven by a belt running over a pulley on one side of the machine. On the other side of the

Digitized by Google

machine another belt ran the conveyer, which itself is spoken of as a belt, about three feet wide. The cylinder and the conveyer operated separately, and either might be running while the other was motionless. The cylinder could be stopped by throwing the belt off of the pulley which ran it, over to a loose pulley.

The shaft on which the cylinder revolved extended two feet or more over the sides of the frame of the machine, and while the cylinder was in motion this shaft could be seen revolving, as well as the pulleys. There was also evidence that the motion of the revolving cylinder shook the frame and the cover of the machine, whereby the motion of the cylinder could be readily detected, especially when one had his hand in contact with the cover thereof. There is some evidence that the whole floor shook from the operation of other machines; although from the evidence it appears that the machines in this room stood upon a brick flooring laid upon the ground. There was evidence that a man standing on the side of the machine upon which plaintiff was when injured in such a position as to enable him to put the fingers of his left hand in the slit in question, would be close enough to the revolving shaft to touch it with his other hand.

As appears from the petition, the negligence with which defendant is charged is in ordering plaintiff to clean the machine without stopping the cylinder, and the failure of defendant to warn plaintiff that the cylinder was in motion and of the danger of putting his hand in the slit.

A careful consideration of the record before us convinces us that the action of the trial court in forcing plaintiff to a nonsuit must be upheld. At the time that plaintiff was injured, he was not engaged in cleaning the cylinder, which was entirely covered by the guard except for the narrow slit mentioned, but was sweeping off the machine with a broom; and, according to the allegations in his petition and his own evi-

Digitized by Google

dence, he saw a piece of jute in this slit and stuck his fingers in there to get it out.

So far as concerns defendant's duty to warn plaintiff of the danger of coming in contact with the revolving cylinder, it appears that plaintiff had been so warned by the foreman sometime prior to this, if indeed any warning can be said to be necessary where the danger is so obvious and apparent. It would seem, then, that the charge of negligence on the part of the master must rest upon the failure to stop the cylinder of the machine while plaintiff was sweeping it off, so that plaintiff, while so doing, might not be injured in case he should thrust his fingers into the narrow slit; this being the only way, under such circumstances, in which it could be conceived that plaintiff might be injured by the revolving cylinder, as the latter was entirely covered except for this very narrow opening. Whether it can be said that defendant, by the exercise of reasonable prudence on its part, could have foreseen that any injury would happen to plaintiff, under the circumstances in evidence, by reason of the cylinder being in motion, is a matter of some doubt. "The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident." [See Ward v. Building Co., 248 Mo. 348, 154 S. W. 483; Chandler v. Gas Co., 174 Mo. l. c. 329, 73 S. W. 502; 62 L. R. A. 474; 97 Am. Stat. Rep. 570; Fuchs v. City of St. Louis, 167 Mo. l. c. 646, 67 S. W. 618; 57 L. R. A. 136; Dean v. Railroad, 199 Mo. 408, 97 S. W. 910; Benton v. City of St. Louis, 248 Mo. 98, 154 S. W. 467.]

But conceding that the question of whether defendant was negligent in not stopping the cylinder was one for the jury, nevertheless we think it clear that plaintiff's injury is directly attributable to his own want of ordinary prudence in negligently placing his fingers in the slit, when the slightest care on his part would have prevented his injuries. Plaintiff must

Digitized by Google

have known the danger attendant upon putting his hand into this opening, with the cylinder in motion; for he had seen material carried in there day after day by the conveyer, and caught by the knives or pins of the cylinder and cut and torn to pieces.

It was said in Nugent v. Milling Company, 131 Mo. 241, 33 S. W. 428: "It would be a thing of folly to say that defendant was negligent because he failed to tell the plaintiff, a young man twenty years of age, that the revolving cylinders or rollers unto which he had been feeding wheat and sweepings from the mill floor, for six months, in order that it might be pulverized to flour, would be dangerous to the hands if they came in contact with them. The danger of the machine he knew . . . he knew as well as anyone connected with the mill that if his hands came in contact with the revolving cylinders they would be crushed to pieces. . . . Whatever there was of danger or risk he could see and appreciate as well as anyone, and as it was known and obvious to him he was as legally responsible for his own protection as was the foreman in charge of the machine for his protection." [See, also, George v. Manufacturing Co., 159 Mo. 333, 59 S. W. 1097; Smith v. Box Co., 193 Mo. 715, 92 S. W. 394; Doerr v. Brewing Co., 176 Mo. l. c. 556, 75 S. W. 600; Nagle v. Gas Co., 169 Mo. App. 243, 152 S. W. 415; Stegman v. Gerber, 146 Mo. App. 104, 123 S. W. 1041.]

That the cylinder, and the shaft and pulleys therewith connected were revolving, at the time that he undertook to remove the piece of jute, must have been as apparent to him as to defendant's foreman or anyone else. Certainly the slightest care or observation on his part would have disclosed that fact, taking into consideration the physical evidences of the motion of the cylinder to which we have referred above. Under such circumstances plaintiff's injury must be attributed to his own negligence; and though his misfortune is such as to excite sympathy in his behalf, defendant should

Digitized by Google

not be compelled to recompense him therefor. We think that the evidence showed plaintiff to be guilty of negligence, as a matter of law, and that it was proper to take the case from the jury.

For the reasons given above the judgment of the circuit court must be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

NICHOLAS MERTZ, Respondent, v. A. LESCHEN & SONS ROPE COMPANY, Appellant.

St. Louis Court of Appeals, May 6, 1913.

1. **MASTER AND SERVANT: Injury to Servant: Liability of Master: Question for Jury.** In an action by a servant for the loss of an eye, caused by a wire springing from the hands of the foreman and striking it while the foreman was endeavoring to thread the wire into the bobbin of a cable-winding machine, evidence *held* to justify submission to the jury of the question whether the foreman was guilty of negligence in permitting the wire to slip from his hand, although the testimony showed that he handled it in the manner wires had been handled for years and that no such accident had happened before.

2. **NEGLIGENCE: Evidence: Inference.** The fact that an appliance had been used for a long time in the same manner it was used at the time it caused an injury and that no injury had theretofore resulted therefrom, does not establish that the operator was not negligent on the occasion in question.

3. **MASTER AND SERVANT: Dual Capacity Doctrine: Vice Principal or Fellow Servant.** An operator of one of three machines, who had no authority over the other operators except when the three machines were operated together as a unit, at which times he superintended their operation and governed and directed the movements of the other operators, was a fellow servant of the other operators when the machines were operated separately, and a vice principal when they were operated as a unit.

4. ———: ———. The "dual capacity" doctrine is firmly established in our law.

Digitized by Google

5. ———: **Non-delegable Duties of Master: Warning.** The master's duty to warn a servant of a danger is a non-delegable duty.

6. ———: **Injury to Servant: Dual Capacity Doctrine: Concurring Negligence.** Where a servant is injured through the negligence of one who, in the performance of some duties, is his fellow servant, and, in the performance of others, is a vice principal, and the latter's negligence as a fellow servant concurs with his negligence as a vice principal in causing the injury, the master is liable.

7. ———: ———: ———: ———: **Facts Stated.** Plaintiff was employed to operate one of three cable-winding machines. At the time of his injury, the three machines were coupled together and operated as a unit, under the superintendency of one of the other operators. One of the bobbins on plaintiff's machine having run out of wire, the superintending operator started to insert a new wire, and directed plaintiff to watch the work so that he could do it the next time. The superintending operator negligently took the end of the wire between his thumb and fingers, which were covered with oil, to thread the wire into the bobbin, and plaintiff, being near-sighted, placed his face in close proximity to the bobbin, in order to see the operation, and the end of the wire sprung from the superintending operator's hand, struck plaintiff's eye and put it out. *Held*, that if it be conceded that the superintending operator was a fellow servant in putting the wire on the bobbin, yet, in instructing plaintiff and in giving the order to watch the work, he was a vice principal, and his failure to warn plaintiff of the danger of obeying the order rendered the master liable, since the master is liable for the concurring negligence of a vice principal and fellow servant.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields,* Judge.

AFFIRMED.

Watts, Gentry & Lee for appellant.

The demurrer to the evidence should have been sustained: (a) Because if Varwig was negligent in letting the wire slip from his hands and injure the plaintiff, his negligence was that of a fellow-servant for which the master is not liable. The men were un-

Digitized by Google

der a common superior, engaged in the common enterprise of making a strand of wire rope, in the same grade of service and with ample opportunity to observe each other's actions and report delinquencies to a common superior. Under such circumstances, even though Varwig had the power to say when to stop or start the machine, he and the plaintiff were fellow-servants. Padgett v. Iron & Steel Co., 140 S. W. 943; Forbes v. Dunnavant, 198 Mo. 193; Herbert v. Wiggins, 107 Mo. App. 287; Murray v. Cable & W. Co., 98 Mo. 573; McCarty v. Hotel Co., 144 Mo. 397; Hawk v. Lumber Co., 166 Mo. 121. (b) The demurrer to the evidence should have been sustained because the slipping of the wire was wholly unexplained. Where the evidence reveals the fact that an injury may have occurred from either one of two or more causes for one of which the master would be liable and for the others of which he would not be liable, plaintiff fails to make out his case unless the evidence clearly shows that the injury resulted from the cause for which the master would be liable. Garansson v. Manufacturing Co., 186 Mo. 300.

George Safford and *Barclay, Fauntleroy & Cullen* for respondent.

(1) For damages caused by negligence of one authorized by the master to perform a nondelegable duty of the master, there being no contributory negligence, the master is liable. Smith v. Car & F. Co., 122 Mo. App. 610; Hagan v. Mining Co., 131 Mo. App. 386; Knight v. Donnelly Bros., 131 Mo. App. 152; Doss v. Railroad, 135 Mo. App. 643; Burkard v. Rope Co., 217 Mo. 466. (2) For damages caused, in part, by the negligence of the master in the performance of a nondelegable duty, and, in part, by the negligence of a fellow-servant in the performance of a delegable duty, the master is liable; i. e., contributory negligence of a fellow-servant is no defense. Young v. Schickle,

Digitized by Google

103 Mo. 324; Dayharsh v. Railroad, 103 Mo. 570; Bluedorn v. Railroad, 108 Mo. 439; Foster v. Railroad, 115 Mo. 165; Browning v. Wabash, 124 Mo. 55; Deweese v. Mining Co., 128 Mo. 423; Hutson v. Railroad, 50 Mo. App. 300; Ellingson v. Railroad, 60 Mo. App. 679; Hayworth v. Railroad, 94 Mo. App. 215; Moriarity v. Swartzschild & Sulsberger Co., 132 Mo. App. 650-655; English v. Shoe Co., 145 Mo. App. 439-451; Harvester Co. v. Bracak, 227 Ill. 71; Dougherty v. Realty Co., 146 Ill. App. 219. (3) The duty to warn is a nondelegable duty, for negligence in the performance of which, in the absence of contributory negligence, the master is liable. Miller v. Railroad, 109 Mo. 357; Doss v. Railroad, 135 Mo. App. 648; Mihileck v. Mignery, 155 Mo. App. 325; Schlavick v. Shoe Co., 157 Mo. App. 83.

ALLEN, J.—This is an action for personal injuries consisting of the loss of an eye, suffered by plaintiff while in the employ of defendant as its servant. Plaintiff recovered and defendant prosecutes the appeal.

Defendant is a manufacturer of wire rope, and at the time that plaintiff received his injuries, his duties ordinarily consisted in operating a machine designed for making such rope. The machine in question is a very complicated one, and nothing like a complete description of it need be attempted. It had a number of bobbins which carried the separate strands of wire and from which these separate wires were unwound, later to be wound into a rope or cable. There were three of these machines, of practically the same kind, placed in a row. One of them was ordinarily operated by plaintiff, another by one Baer and the third by one Varwig. These three machines could be operated separately, as they ordinarily were, or they could be coupled up and operated together, as was done when

Digitized by Google

it was desired to make a large wire rope or cable. When the machines were run separately each operator attended to his own machine; when they were coupled however and running together Varwig had charge of the three machines. One Berding was the foreman over this department, having charge of the entire floor upon which these machines were situated. It was he who instructed plaintiff how to operate his machine when plaintiff was first put to work at it. Plaintiff had been working at this machine about a month prior to the accident.

All three of these operators were subject to the general orders and directions of the foreman, Berding. However, when the three machines were coupled up as described above, it appears that under the master's orders Varwig was to have charge of and supervision over all three of the machines, with authority to give directions to the other two men. With respect to his own duties and authority, when the three machines were running together, a portion of Varwig's testimony, as it appears in the record, is as follows: "I had to give directions to two men. . . . Mr. Mertz was working under me and he received orders from me. He had been working in that department about a month and he received his directions from me, that is provided we were coupled up. We had three machines coupled together when he was working under me; otherwise I didn't have anything to do with him. When the three machines were working together, I had charge of them. . . . At all times, except when the three were coupled, I had no authority whatever over Mertz and gave him no orders of any kind. . . . Whenever we coupled up, I was supposed to instruct them."

In regard to this same question, a portion of plaintiff's testimony appears as follows: "When the three machines were coupled together it took three of us to run them. Mr. Varwig had charge of the crew

Digitized by Google

of three and gave instructions to me and to Mr. Baer. When they were coupled together no one but Varwig gave the instructions as to how the machines were to be run. . . . Whenever we ran together he had charge of them. Mr. Berding told us to go to Varwig for instructions when we were coupled up together. That was when I first went on."

At the time plaintiff received his injury, the three machines were coupled and running together, for the purpose of making a larger cable out of the wires that came from the three machines. When so running the finished cable came out from Varwig's machine. It started at plaintiff's machine with twelve wires, continuing through Baer's machine, where it received twelve more wires, on through Varwig's machine, which carried eighteen wires. In addition to these smaller wires, there was a big wire in the center of the cable that began with plaintiff's machine, and about which the smaller wires were wound. Each small wire was unwound from a separate bobbin, and, by complicated movements of the machines, the wires were ultimately wound into a large strand of wire rope.

When these machines were thus being operated in conjunction with each other, any one of the operators could stop all three machines. This was done in case a wire broke, or a bobbin ran out of wire, etc. On the day in question these three machines were being so operated, when a bobbin on plaintiff's machine became empty and the machines were stopped to fill this bobbin. In doing this it was necessary to put the wire through a small hole in what is called the journal of the flier. It appears that plaintiff had put wires on larger bobbins, but that he had never done so with a small bobbin, such as had become empty, and Varwig testified that it had to be done in a way different from that which was employed in the case of larger bobbins such as plaintiff had been using. It appears in fact that plaintiff had never put a wire through one of these

Digitized by Google

journals when the machines were coupled up. In order to do this Varwig took hold of the end of the wire, telling plaintiff to hold the bobbin, to tighten the tension, and directing plaintiff to watch how he did it, saying: "Watch me while I put this through the flier so that you can do the same thing the next time yourself." Varwig testified that he took hold of the wire with his right hand about four inches from the end of the wire, with this hand under the wire, holding the latter between his thumb and his fingers; that with his left hand he grasped the wire probably about two and one-half or three feet from his right hand. He was using his right hand to put the wire into the hole in the journal of the flier, keeping all the time his left hand about two and one-half or three feet further down on the wire, and was starting to put the wire into this hole. While he was so doing he called to plaintiff, telling him to watch how it was done so that plaintiff could do the same thing thereafter. Thereupon plaintiff, who was nearsighted, and which Varwig knew, placed his face within about two feet of the end of the wire to watch Varwig thread it into the hole in question. Varwig did not get the wire into the flier, but it slipped or flew out of his right hand, the end of the wire flying upward and springing backward, striking plaintiff in the eye, and putting his eye out. It appears that the wire did not move at all from Varwig's left hand. He did not let go of the wire with this hand at all. In other words it does not appear that the wire was jerked or pulled from Varwig's hands or that it slipped longitudinally out of his right hand; on the contrary it appears that when he had hold of it from beneath, with the thumb and fingers of his right hand, about four inches from the end, this portion of the wire slipped upward out of his grasp, and that the spring in it caused it to fly back far enough to strike plaintiff in the eye. The wire was oily and slippery, and Varwig's hands were covered with oil.

Digitized by Google

The latter testified that he was threading the wire into the hole in question in the same way that he had always done heretofore, but nevertheless the wire slipped from his fingers.

At the close of plaintiff's case defendant offered an instruction in the nature of a demurrer to the evidence, which was refused by the court. Thereupon defendant offered no evidence, except three photographs, two being of the machine upon which plaintiff was working, and one showing the three machines as they were being operated at the time of plaintiff's injury.

Appellant's only assignment of error pertains to the overruling of its demurrer to the evidence. It is contended that the demurrer should have been sustained, (1) because, even granting that Varwig was negligent, his negligence was that of a fellow-servant; (2) because no negligence on the part of Varwig was shown; and (3) because the slipping of the wire was unexplained and therefore the injury may have occurred from either one of two or more causes, for only one of which the master would be liable.

I. Taking up the reasons why appellant says that its demurrer should have been sustained, we may dispose of the second and third thereof together. In the first place it will not do to say, as does appellant, that the slipping of the wire was wholly unexplained, and therefore that it may have happened from a cause for which the master would not be liable. Appellant's contention is that, inasmuch as plaintiff had charge of one end of the wire—i. e., had hold of the bobbin to keep the wire from unwinding—and Varwig had hold of the other end of the wire, therefore the latter may have been caused to slip by reason of some act of plaintiff, as well as by reason of any failure on the part of Varwig to hold it properly. Varwig's testimony however puts this theory out of the case. From his testimony it is evident that the wire did not slip

Digitized by Google

back out of his hands; on the contrary it appears that he held it firmly with his left hand about two and one-half or three feet from the end of the wire. The evidence tends to contradict any theory that the wire slipped longitudinally at all. It seems that what happened was that the end of the wire flew upward out of his right hand, i. e., from the grasp of the thumb and fingers of his right hand, with which he was holding it from below, about four inches from the end of the wire. In other words, so far as concerns the springing back of the wire, this was evidently occasioned by Varwig's permitting the end of it to thus slip upward out of the grasp of the thumb and fingers of his right hand. No other theory is tenable under the evidence, and the latter clearly indicates that this was what happened. Hence so far as the slipping of the wire is concerned, the question is purely whether it can be said to have been negligence on the part of Varwig to thus allow the end of it to escape from his grasp. It certainly cannot be held, as a matter of law, that Varwig was in no way negligent in thus permitting the end of the wire to slip from between his thumb and fingers.

Appellant lays considerable stress on Varwig's testimony to the effect that he had for years inserted wires in the journals of these fliers, without having the wire slip from his hand as it did upon this occasion, and that he was performing the operation in question just as he had been doing for all of these years. From this it is argued that it could not have been negligence on the part of Varwig to do as he did. This, however, is a *non sequitur*. It by no means proves that Varwig was not negligent upon this occasion. In fact we are more inclined to think that this has some tendency at least to show that Varwig was negligent on the occasion in question, for it would seem that, with due care on his part, the wire might have been inserted in the place in which it was intended to go, as had been done

Digitized by Google

on numerous occasions prior thereto. His fingers were oily and slippery. It does not appear whether he customarily undertook to perform this operation with his fingers covered with oil, but at any rate this was a circumstance to be considered by the jury, touching the question of his negligence. We entertain no doubt that the question of Varwig's negligence with respect to the holding of the wire was properly one to be referred to the jury.

II. The liability of the master hinges upon whether plaintiff and Varwig were fellow-servants. It cannot be doubted that, when the three machines in question were connected and being operated together, Varwig, during such period, occupied in general the relation towards plaintiff of vice principal and became the *alter ego* of the master. We think this is beyond dispute or cavil. It is clear that the master had conferred authority upon Varwig to take charge of and superintend the operation of the three machines, when being operated together, and to govern and direct the movements of the other two men in question during such period of time. Ordinarily, then, plaintiff and Varwig were not fellow-servants during such period, but the latter occupied toward plaintiff the position of vice principal.

In Burkard v. Rope Co., 217 Mo. l. c. 482, 117 S. W. 35, the rule laid down in Moore v. Railroad, 85 Mo. 588, is reaffirmed, citing the cases in which it has been followed, the court saying:

"It is ruled that they are fellow-servants who, under the direction and management of the master himself, or by some servant placed by the latter over them, are engaged in the prosecution of the same common work, and without any dependence upon or relation to each other except as colaborers without rank, and that he is a vice principal who is intrusted by the master with power to superintend, direct or control the workman in his work, and that for negligence in

Digitized by Google

such superintendence, direction or control, the master is liable. That case has been many times cited with approval by this court. [Hoke v. Railroad, 88 Mo. 361; Stephens v. Railroad, 86 Mo. 221; Smith v. Railroad, 92 Mo. 359; Tabler v. Railroad, 93 Mo. 79; Russ v. Railroad, 112 Mo. 45.]"

In the same case (Burkard v. Rope Co., supra) the court quotes approvingly from LaSalle v. Coste, 190 Ill. 130, where the following rule was enunciated:

"Where a master confers authority upon one of his employees to take charge and control of a certain class of workmen in carrying on some particular branch of his business, such employee, in governing and directing the movements of the men under his charge with respect to that branch of the business, is the direct representative of the master, and not a mere fellow-servant; and all commands given by him within the scope of his authority are in law the commands of the master."

Numerous other cases might be cited to show that the question as to who are and who are not fellow-servants is to be determined by the principles asserted in the cases from which we have just quoted; but we deem reference to further authorities unnecessary.

The "dual capacity" doctrine is firmly established in our law. [See Radtke v. Basket & Box Co., 229 Mo. l. c. 23, 129 S. W. 508; Fogarty v. Transfer Co., 180 Mo. 490, 79 S. W. 664; Bane v. Irwin, 172 Mo. 307, 72 S. W. 522; Bien v. Transit Co., 108 Mo. App. 399, 83 S. W. 986; McIntyre v. Tebbetts, 140 Mo. App. 116, 120 S. W. 621; English v. Rand Shoe Co., 145 Mo. App. 438, 122 S. W. 747.] When the three machines were running separately, plaintiff and Varwig were fellow-servants. But there can be no doubt that upon occasions when large cables were being manufactured by running the three machines together, Varwig had the superintendence and control over the other two workmen who were then engaged in this particular

Digitized by Google

branch of the master's business. His testimony, as well as that of plaintiff, shows that he then had authority, as the representative of the master, to give orders and commands to the other two men and to direct and control their movements and operations, and it was his duty to instruct them. Clearly, then, upon such occasions, and while in the performance of such duties, he was not a fellow-servant with the other two men, but a vice principal over them.

III. The crucial question in this case, however, pertains to the relation existing between Varwig and the plaintiff at the time of the latter's injury, considering the nature of Varwig's acts at that particular time and the attending circumstances. The argument advanced by learned and astute counsel for appellant is that Varwig's act at the particular time in question, in undertaking to put this wire on the bobbin, was one relating purely to his duties as a colaborer with plaintiff, and that his negligence, if any, in the premises was that of a fellow-servant; in other words, granting that Varwig was ordinarily a vice principal as to plaintiff, when the three machines were being operated together, nevertheless, for the performance of the particular act in question, Varwig had for the time being stepped aside, as it were, from the capacity of vice principal, and became a fellow-servant with plaintiff.

In Fogarty v. Transfer Co., supra, a leading case on the subject in this State, the court quoted approvingly from Railroad v. May, 108 Ill. l. c. 298, as follows:

"The mere fact that one of a number of servants who are in the habit of working together in the same line of employment, for a common master, has power to control and direct the actions of the others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, with-

Digitized by Google

out regard to other circumstances. On the other hand, the mere fact that the servant exercising such authority, sometimes, or generally, labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case, in this respect, must depend upon its own circumstances. If the negligence complained of consists of some act done or omitted by one having such authority, which relates to his duties as a colaborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable. For instance, if the section boss of a railway company, while working with his squad of men on the company's road, should negligently strike or otherwise injure one of them, causing his death, the company would not be liable; but when the negligent act complained of, arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his colaborers, the master will be liable."

Although that case involved the law of Illinois on the subject, the court declares the rule to be the same in Missouri, citing the prior decisions of our Supreme Court upon this question. [See, also, Hollweg v. Bell Tel. Co., 195 Mo. l. c. 157, 93 S. W. 262; Hawk v. Lumber Co., 166 Mo. l. c. 129, 65 S. W. 1022; Bane v. Irwin, supra; MyIntyre v. Tebbetts, supra; Bein v. Transit Co., supra; Rigsby v. Oil Well Supply Co., 115 Mo. App. l. c. 314, 91 S. W. 460; English v. The Rand Shoe Co., 145 Mo. App. l. c. 450, 122 S. W. 747.]

In Rigsby v. Oil Well Supply Co., supra, this court speaking through NORTONI, J., said: "It of course necessarily follows that, although the servant, who is a vice principal as to certain of his duties, and while engaged in such duties which are personal to and absolute upon the master, he is always, when engaged in the ordinary duties of the servant in so far as he

Digitized by Google

thus disrobes himself of the master's duties, and participates in those of a colaborer, a fellow-servant to that extent, and his negligence, while thus acting as a fellow-servant, will not charge the master with liability to the fellow-servant therefor. . . . And hence the law is well established that it is the act from which the injury results, performed by the person occupying this dual capacity, and not the rank, which is the true test of the master's liability thereunder."

And in English v. Rand Shoe Co., supra, this court speaking through the same learned judge said: "The doctrine is firmly established in this State with respect to the master's liability asserted on the grounds of negligence in the servant occupying a dual capacity, to the effect that it is the *character of the act,* and *not the rank* of the servant, which determines the liability or nonliability in a given instance." [Citing the Fogarty, Bein, Rigsby and McIntyre cases, supra.]

In the case before us, however, the liability of the master does not turn upon whether the manual act of Varwig in attempting to put the wire through the journal of the flier and his negligence, if any, in so doing, is to be considered as the act and the negligence of a fellow-servant on the one hand or that of a vice principal on the other; although it is said that this question is one to be determined by the court and not to be submitted to the jury. [Radtke v. Basket & Box Co., supra, l. c. 23-26.] This is for the reason that plaintiff's injury came about, not because of the isolated act of Varwig in permitting the wire to slip from his fingers, but in consequence of the latter, combined with the order or direction given by Varwig to plaintiff to watch how Varwig put the wire through the journal, causing plaintiff to place his face in close proximity to the end of the wire in order to receive instructions in this regard.

At the time in question, Varwig was clothed by the master with power and authority to give orders and

Digitized by Google

directions to the plaintiff, and it was his duty to instruct the latter. The order was given without any warning to plaintiff of the danger of placing his eyes in such close proximity to the end of the wire, although Varwig knew that plaintiff was nearsighted. The duty to warn is of course a nondelegable duty. In the giving of such an order, without warning of the danger which might attend its obedience, the jury might well find that Varwig was negligent, and his negligence in the premises is the negligence of the master.

In Radtke v. Basket & Box Co., supra, the opinion quotes approvingly from earlier decisions of that court as follows:

"In Browning v. Railway Co., 124 Mo. l. c. 70, it is said: 'It must be considered as settled in Missouri (in accord with the generally accepted law elsewhere) that where an employee sustains injury in consequence of the combined negligence of the master and of some fellow-workman, he will not, for that reason alone, be denied a recovery. [Young v. Iron Co., 103 Mo. 324.]' To like effect is Bluedorn v. Railway Co., 108 Mo. l. c. 448, wherein BLACK, J., said: 'Nor is the plaintiff's action defeated because he and the persons in charge of the train were fellow-servants; for the train was run at a rate of speed prohibited by the ordinance, pursuant to a time card prepared and promulgated by the defendant. The unlawful and negligent act was the joint act of the defendant, and of the servants in charge of the train. The law is well settled that one servant may recover for an injury caused by the combined negligecne of the master and a fellow-servant.'"

In Rigsby v. Oil Well Supply Co., supra, this court said: "There is an additional reason, however, why we think liability might attach to the master in this case even though the act of Austin as fellow-servant contributed to cause the lumber to fall, and that is, it is well-settled law that when the negligence of

Digitized by Google

the master is combined with that of the fellow-servant in producing the injury, and the negligence of neither alone is the efficient cause, both the master and fellow-servant are liable and the injured servant may maintain his action against either or both, on account of such injury. [Browning v. Railway Co., 124 Mo. 55, 27 S. W. 644; Young v. Shickle, H. & H. Co., 103 Mo. 324, 15 S. W. 771; Irmer v. Brewing Co., 69 Mo. App. 17; 12 Am. and Eng. Ency. Law (2 Ed.), 905.]"

The case before us falls clearly within the doctrine of the cases to which we have just referred. That is to say, if we concede that Varwig was a fellow-servant in so far as concerns his act of putting the wire on the bobbin, he nevertheless was acting as a vice principal in instructing plaintiff and in giving the order in question. Plaintiff's injury was not caused by the negligence of Varwig alone in permitting the wire to slip from his hand, nor was it caused alone by his negligence in giving the order without a warning of danger. Both of his acts combined to produce plaintiff's injury; neither alone would have caused it. If, therefore, the jury find Varwig to have been negligent in the performance of these acts, then, conceding one to be the act of a fellow-servant, the injury is due to the combined negligence of the master and that of a fellow-servant, for which the master is liable. We think that the court did not err in overruling defendant's demurrer to the evidence.

The instructions are not challenged and no point is made as to the amount of the verdict. The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

Digitized by Google

JOSEPH WALLACE, Respondent, v. PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

St. Louis Court of Appeals, May 6, 1913.

1. **JUSTICES' COURTS: Pleading: Requisites of Statement.** Formal pleadings are not required in actions instituted in a justice's court, and a statement is sufficient if it affords reasonable notice to defendant of the claim relied on and is definite enough to operate as a bar to another suit.

2. **———: Life Insurance: Action on Industrial Policy: Sufficiency of Statement.** In an action instituted in a justice's court on an industrial life insurance policy, *held* that the statement afforded reasonable notice to defendant of the claim relied on and was definite enough to operate as a bar to another suit, and, therefore, was sufficient; *held, further*, that plaintiff, a brother of insured, was entitled to recover, without amending the statement, on the theory that insurer's agent agreed with insured and plaintiff that, upon the death of insured, the amount of the policy would be paid to plaintiff, although the policy, on its face, was payable to the personal representative of insured.

3. **LIFE INSURANCE: Industrial Policy: Authority of Agent: Designation of Beneficiary.** Reason and justice require that a life insurance company should be bound by the acts of an agent who solicits industrial insurance, delivers the policy, collects the weekly premium due thereon and is the only representative of the company with whom the insured deals or comes in contact; and hence a life insurance company was bound by a statement made by its agent at the time an industrial policy was issued, in response to a request by insured that his brother be made beneficiary, that it was not necessary that the brother be actually named as beneficiary and all that was needed was for him to have possession of the policy, and the brother, who had possession of the policy at the time of insured's death, was entitled to recover thereon, although, on its face, it was payable to the personal representative of insured.

4. **———: ———: ———: ———: Evidence: Varying Written Instrument.** Where an industrial life insurance policy provided that it should be payable to the personal representative of insured unless payment should be made as provided for by the so-called "facility of payment" clause, which authorized the

Digitized by Google

company to make payment to any relative or any other person equitably entitled to the same, parol evidence that the agent negotiating the insurance informed the insured and plaintiff, the insured's brother, whom the insured desired to make beneficiary, that the proceeds would be paid to plaintiff if he produced the policy, was not inadmissible as tending to vary the provisions of a written instrument, since the policy was not, by its terms, payable to the personal representative absolutely and in any event and the "facility of payment" clause provided that payment might be made to any one in the position of plaintiff coming within the class there designated.

5. **TRIAL PRACTICE: Credibility of Witnesses: Function of Jury.** The credibility of witnesses and the weight of the evidence are questions for the jury.

6. **LIFE INSURANCE: Industrial Policy: Enforcement: Policy of Law.** It should be the policy of the law to enforce industrial life insurance policies without administration where possible, since the chief object of this form of insurance is to provide a fund to defray funeral and last illness expenses, which will be available when needed and not be subject to the delay and costs incident to administration.

7. ———: ———: **Representations of Agent: Designation of Beneficiary: Instructions.** In an action on an industrial life insurance policy which was payable to the personal representative of insured, where plaintiff, insured's brother, claimed as beneficiary by reason of an agreement made by insurer's agent with insured and plaintiff that, upon the death of insured, the amount of the policy would be paid to plaintiff if he was in possession of it at that time, the court instructed the jury, at the instance of plaintiff, that if the jury found that, at the time he applied for the policy, insured stated to insurer's agent that he desired it made payable to his brother, and the agent informed him that it would be payable to his brother or any other person who might present it to insurer after the death of insured "*and that the policies issued by the defendant were so payable to the person presenting the same after the death of the insured*," their verdict should be for plaintiff. *Held*, that the clause italicized referred to the representations of the agent concerning the person to whom the policy was payable, and hence did not submit a question of law to the jury; *held, further*, that even if it could be held that the clause submitted a question of law, the error would not be prejudicial, since it would simply require the jury to find more than was necessary to entitle plaintiff to recover.

8. **INSTRUCTIONS: Submitting Question of Law: Harmless Error.** An instruction for plaintiff which submits a question

Digitized by Google

of law is not prejudicially erroneous if its only effect is to require a finding of more than is necessary to entitle plaintiff to recover.

9. **APPELLATE PRACTICE: Damages for Vexatious Appeal.** Where an insurance company, sued on an industrial life policy, did not put forward any defense on the merits, and, although no just or reasonable ground for appeal existed, nevertheless appealed from the judgment rendered against it, *held* that ten per cent damages should be added to the amount of the judgment, for vexatious appeal, as authorized by Sec. 2084, R. S. 1909.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm,* Judge.

AFFIRMED.

Fordyce, Holliday & White for appellant.

(1) This case should be reversed because of the failure of the court below to give defendant's instruction in the nature of a demurrer to the evidence. (2) The court erred in admitting over the objection of defendant's counsel the insurance policy offered by the plaintiffs, as this policy did not support the allegations of the petition, but showed on its face that it was payable to the executors or administrators of the insured. Cosgrove v. Leonard, 175 Mo. 100; Gruell v. National Counsel, 126 Mo. App. 496; Compton v. Missouri-Pacific, 147 Mo. App. 414; Sommers v. Keller, 152 Mo. 626; White v. Chaney, 20 Mo. App. 389. (3) The "facility of payment" clause in the policy gave the company an option to pay the benefit to others than the executors or administrators, but did not confer upon such others any right to sue for or collect the benefit. Floyd v. Prudential Ins. Co., 72 Mo. App. 455; Kelly v. Prudential Ins. Co., 148 Mo. App. 249; Ferretti v. Prudential Ins. Co., 97 N. Y. Supp. 1007, 49 Misc. Rep. 489; Wokal v. Belsky, 53 N. Y. App. Div. 167, 65 N. Y. Supp. 815; Golden v. Life Ins. Co., 35 N. Y. App. Div. 569, 55 N. Y. Supp.

Digitized by Google

143; Life Ins. Co. v. Bank, 121 Mo. App. 479; Lewis v. Metropolitan, 178 Mass. 52; Brooks v. Metropolitan, 70 N. J. L. 36; Thomas v. Pruential Ins. Co., 148 Pa. St. 594; McNally v. Metropolitan, 199 Pa. St. 481. (4) The court erred in admitting over defendant's objection the testimony of an oral agreement that the policy should be payable to the plaintiff Joseph Wallace. Rhodus v. Life Ins. Co., 156 Mo. App. 281; White v. Chaney, 20 Mo. App. 389; Grisham v. Insurance Co., 130 Mo. App. 57; and authorities cited under point 2. (5) The court erred in giving instructions Nos. 1 and 2 of its own motion as these instructions submitted the case on an issue not raised by the pleadings. Black v. Railroad, 217 Mo. 672; Hufft v. Railroad, 222 Mo. 286; Christian v. Insurance Co., 143 Mo. 460; Lemaster v. Railroad, 122 Mo. App. 313; Bond v. Sandford, 134 Mo. App. 477. (6) Said instruction No. 2 was also erroneous in that it submitted a question of law to the jury. Coleman v. Roberts, 1 Mo. 97; River Co. v. Warner, 93 Mo. 384; Armstrong v. Railway, 62 Mo. App. 645.

R. G. Meigs and *Jno. B. Dempsey* for respondent.

(1) The court did not err in admitting the policy in evidence, the plaintiff having offered to submit evidence that at the time of making the contract of insurance a valid agreement was made that the plaintiff herein should be the beneficiary, and he did prove this fact. Renfro v. Insurance Co., 148 Mo. App. 259. (2) (a) Where a policy of insurance does not name a beneficiary and provides that "the production by the company of this policy, and a receipt for the same paid, signed by any person furnishing proof satisfactory to the company that he or she is an executor or administrator, husband or

Digitized by Google

wife, or relative by blood, or lawful beneficiary of the insured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same," any one of the parties named may recover on the policy by a proper showing of the relationship, though a beneficiary was named in the application, which has not been made a part of the policy. Life Ins. Co. v. Galvin, 24 K. L. Rep. 444, 68 S. W. 655. (b) If the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, or if the designations used are applicable to several persons, or if the designation is imperfect or ambiguous, extrinsic evidence is admissible to ascertain the meaning of the contract; and when ascertained they will be deemed to be comprehended within it who were in the minds of the parties when the contract was made. So where the agent was told that the insurance was desired for the widow and heirs of the insured, the above rule was given direct application, and it was held not essential that they should be named in the policy. Bacon on Benefit Socities and Life Insurance (3 Ed.), sec. 263; Clinton v. Hope Ins. Co., 45 N. Y. 461; Meyers v. Life Ins. Co., 41 Mo. 538; Pace v. Pace, 19 Fla. 438; Beackman v. Imperial Council, 11 N. Y. Supp. 321; Renfro v. Life Ins. Co., 148 Mo. App. 258. (3) The acceptance of proofs of loss, of the policy and receipt book, the offer to pay to plaintiff the amount of the premiums paid in, he being a relative by blood of the insured, and therefore one of the persons designated in the policy constituted an election by the company to pay him and is binding upon the insurer. Andrus v. Insurance Assn., 168 Mo. 151.

ALLEN, J.—This is an action upon a policy of insurance. Plaintiff recovered, and defendant prosecutes the appeal.

Digitized by Google

The instrument sued on is what is known as an industrial policy, and purports to be payable to the executors or administrators of the insured, "unless settlement shall be made as provided in article 2 under the head of provisions." The clause of the policy last referred to is known as a "facility of payment" clause, providing that the insurance company may make any payment provided in the policy "to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, for his or her burial or, if the insured be more than fifteen years of age at the date of this policy, for any other purpose, and the production by the company of a receipt signed by any or either of said persons, or of other sufficient proof of such payment to any or either of them, shall be conclusive evidence that such benefits have been paid to the person or persons entitled thereto, and that all claims under this policy had been fully satisfied."

The cause originated before a justice of the peace, and was instituted by plaintiff, Joseph Wallace, a brother of the insured, and one John Collins, an undertaker. They recovered before the justice, and the defendant duly appealed to the circuit court, where a trial was had before the court and a jury. During the trial the cause was dismissed as to said Collins, and proceeded to verdict and judgment in favor of plaintiff, Joseph Wallace, respondent in this court.

The policy in question was issued August 23, 1909, insuring the life of Willam L. Wallace in the sum of $176, in consideration of a weekly payment of ten cents. It provided that, in case of the death of the insured within six months after the issuance of the policy, only one-half of the benefits thereunder should be payable. The insured died on or about

Digitized by Google

January 26, 1910, all the weekly premiums under said policy having been paid.

The evidence shows that plaintiff was present at the time the policy in question was issued to the insured through one Taylor, an agent of the defendant company; that the insured wanted the policy made payable to plaintiff, and he and plaintiff requested that it be so issued, but the agent told them that this was unnecessary, saying, "the holder of every policy gets the money; you will get the money, all you have to do is to have the policy." It was shown that the agent solicited the insurance, delivered the policy, and collected the weekly premiums thereunder, and that the insured and plaintiff dealt solely with him in the premises. The plaintiff kept the policy until the death of his brother, when he went to Collins, the undertaker, and arranged with him to bury the insured, turning over the policy to him as security for the payment of the funeral expenses. The undertaker, at the instance and request of plaintiff, buried the deceased at an expense of $86.50, and through him proofs of death were furnished defendant and demand made for the payment of the amount due under the policy. The defendant refused to pay the amount due under the policy either to Collins or to plaintiff, but tendered to the latter two dollars and some cents, the amount of the premiums paid thereon.

During the trial in the circuit court, plaintiff asked leave to amend the statement upon which the cause was tried in the justice court, by inserting allegations to the effect that the defendant in issuing the policy, had, through its authorized agent, agreed with insured and plaintiff that in the event of the death of the insured the amount of the policy would be paid to plaintiff, Joseph Wallace, on production of the receipt book and policy. The court refused to permit this amendment, but admitted proof of the conversation with the agent, above mentioned.

Digitized by Google

Appellant assigns as error the admission of the policy in evidence, upon the ground that it did not support the allegations of the petition; the admission of testimony of the conversation with defendant's agent; the overruling of a peremptory instruction which it offered, in the nature of a demurrer to the evidence; and the giving of two instructions given by the court of its own motion.

I. We need not set out the statement originally filed in the justice court and upon which the cause was tried. The point that plaintiff could not recover upon the policy in evidence, under the allegations of the statement, is not well taken. In a cause originating before a justice of the peace formal pleadings are not required, and much latitude is allowed in the statement of the cause of action. It is well settled by a long line of decisions that a statement before a justice of the peace is sufficient (1) if it affords reasonable notice to the defendant of the claim relied on, and (2) is sufficiently definite to operate as a bar to another suit on the same cause of action. [See Lord & Bushnell Co. v. Railroad, 155 Mo. App. 175, 134 S. W. 111; Guaranty Interior Fixture Co. v. Baseball Co., 152 Mo. App. 601, 133 S. W. 849; Union Brewing Co. v. Ehlhardt, 139 Mo. App. 129, 120 S. W. 1193.] The statement before us is sufficient in these two respects, and the plaintiff was entitled thereunder to have his right to recover on the policy adjudicated, without the necessity of amending it.

II. The alleged error in admitting the testimony concerning the conversation had with defendant's agent, when the policy was issued and delivered, involves the question of the authority of the agent to bind the defendant company by any such oral agreement or representations in the premises, as well as the point made that such testimony tends to vary or

Digitized by Google

contradict the terms of the policy. It cannot be doubted, we think, that the defendant should be held to be bound by the acts of the agent under the circumstances of the case. It appears that the plaintiff and the insured relied entirely upon the statements and representations made by the agent with respect to the policy. They applied to him to have the plaintiff made beneficiary in the policy, and he assured them that under the terms thereof it was wholly unnecessary that plaintiff be actually named as beneficiary, but that all that was needed was for plaintiff to have possession of the policy in order to claim thereupon. Reason and justice require that the insurance company should be bound by the acts of an agent who solicits this character of insurance, i. e., "industrial insurance," delivers the policy, collects the weekly premiums due thereon, and is the only representative of the company with whom the insured ever deals or comes in contact.

This question has been recently passed upon by this court in Jones v. Insurance Company, 173 Mo. App. 1, wherein the court, speaking through NORTONI, J., said: "If it were competent for James to induce the insurance and collect the premiums and deliver the policy therefor, it was certainly competent for him to waive the condition of the policy, which waiver alone rendered the insurance valid to the use contemplated and which he utilized to the end of negotiating it. [See Wagaman v. Security, etc. L. Ins. Co., 110 Mo. App. 616, 85 S. W. 117.] Moreover, in answer to the suggestion that it is not competent as a rule for a mere soliciting agent to either waive such a condition of the policy or estop the company thereabout, the nature and character of the business and the authorized duties of such agents are to be considered. As before stated, the business of industrial insurance is conducted principally among people of the poorer classes, many of

Digitized by Google

whom are illiterate and but slightly informed concerning intricate business matters. . . . To the people with whom they deal, such agents are justly regarded as representatives of the company, with complete power touching the performance of the duties which they daily exercise in their presence. In these circumstances, it would seem, furthermore, that, the precepts of natural justice preclude the company, through the intervention of the principle of estoppel, from disputing the validity of the acts and conduct of such a soliciting agent, by which its patrons are induced to part with the premium which eventually finds its way into the home office till of the company. It is the high aim and purpose of the common law to afford adequate relief, to the end of effectuating a just result in the circumstances of every case. It should be administered, too, in every instance with reference to the peculiar facts of each case in connection with a degree of common sense from which the law itself is evolved. In this view, the acts and conduct of such agents in so far as they are put forward and performed in the fulfillment of their office, in negotiating insurance and collecting the premium thereon, should be regarded as those of the company."

This, we think, applies with full force to the facts of this case, regarding the agent's authority in the premises.

And the contention that testimony as to the conversation in question was inadmissible as tending to vary or contradict the written contract between the parties is without merit. The policy is not by its terms payable to the executors or administrators absolutely and in any event. The "facility of payment" clause provides that the company may pay to any one in the position of plaintiff, coming within the class there designated. An oral representation or agreement, therefore, that the company would pay plaintiff, provided he had the possession of the policy,

Digitized by Google

cannot be said to vary or contradict the terms of the written instrument.

III. It follows that the demurrer to the evidence was properly overruled. The testimony of plaintiff concerning the conversation with defendant's agent at the time the policy was issued prima facie established plaintiff's right to recover thereon. It was for the jury to pass upon the credibility of the witness and the weight of the evidence. It is the contention of appellant that the "facility of payment" clause merely gave the company the option to pay to one other than the executors and administrators, and that under the terms of the policy only the executor or administrator can sue to enforce the same. The latter is certainly not true in this case, where there is evidence that defendant's agent reprensented to plaintiff and the insured that the policy would be paid to plaintiff, if he had possession of it after the death of the insured. Beyond this, we are not concerned with this point, upon which appellant lays so much stress. We are aware of what this court has said concerning the "facility of payment" clause in such policies in the cases referred to by learned counsel for appellant, but since plaintiff may enforce the policy, as though he were named as beneficiary therein, the effect, in general, of such a provision is immaterial to the determination of the issues in this case.

We may say, however, that defendant has not paid the amount due under the policy to anyone. It is not a case where the company has elected to pay some one appearing to be entitled thereto under the "facility of payment" clause, and asserts this in defense of the action. Its position that it will pay only the executor or administrator comes, we think, with rather bad grace, when, by the very argument advanced by appellant it might have paid either the undertaker who buried deceased, or plaintiff who had the policy

Digitized by Google

and who obligated himself for funeral expenses, and been protected in so doing.

The chief aim and object of this form of insurance is to provide a fund to defray funeral and other expenses attendant upon the last illness of the insured, and one that will be available when needed for such purposes, and not be subject to the delay incident to administration and to be consumed in the costs and expenses thereof. The amount here involved, exclusive of interest, is eighty-eight dollars. If appellant has any real defense to the policy it has not asserted it, but is standing upon what it conceives to be its right to be sued only by the executor or administrator of deceased. As a result this small fund, instead of being at once available for the payment of the undertaker's bill, has been the subject of litigation for more than three years. The courts should not lend their sanction to the attitude here assumed by defendant; and it should be the policy of the law, where possible, to enforce such policies of insurance without the necessity of administration.

IV. The point that the instructions submitted the case upon an issue not raised by the pleadings, i. e., whether or not insured and plaintiff were led to believe that the policy would be payable to any one who held it after the death of the insured, is disposed of by what we have said above concerning the statement filed in the justice court.

The second instruction is assailed upon the ground that it submits an issue of law to the jury. The portion of this instruction, with which we are concerned, is as follows:

"The court instructs the jury that if they find from the evidence that at the time William L. Wallace made application for the policy of insurance referred to in the evidence he stated to the agent of the defendant that he desired to have it made payable to his

Digitized by Google

brother Joseph Wallace, and that said agent represented to him that the policy he would receive would be payable to his brother or any other person who might present it to the company after the death of said William Wallace, *and that the policies issued by the defendant were so payable to the person presenting the same after the death of the insured,* . . . you will find a verdict in favor of plaintiff etc."

It is contended that the portion of this instruction which we have italicized above submits a question of law. Appellant construes the language of the instruction to require the jury to find that defendant's policies "were so payable to the person presenting the same," etc.; whereas, it is evident that this portion of the instruction refers to the representations of the agent—that is to say, finding the other things mentioned, a recovery is authorized if the jury find that the agent represented that the policy would be payable to plaintiff or any other person who might present it, and represented that the policies issued by defendant were so payable, etc. But were we to accept appellant's construction thereof, which indeed would make it submit a question of law to the jury, we are unable to understand how appellant could possibly have been prejudiced thereby. It would simply require the jury to find more than was necessary to be found to entitle plaintiff to recover, and could not be error prejudicial to appellant.

V. The appeal appears to be wholly without merit. We are asked to assess the statutory penalty of ten per cent as for vexatious appeal, under section 2084, Revised Statutes 1909. Our conclusion is, that it is a case coming within the purview of that statute. No defense whatsoever on the merits is suggested, and we can find no just or reasonable ground for the appeal, inasmuch as the judgment below in favor of plaintiff would have fully protected appellant from

Digitized by Google

further claims on the policy. The judgment will therefore be affirmed, with ten per cent of the amount thereof added thereto, for vexatious appeal. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

CHARLOTTE BANTE, Respondent, v. LOUIS BANTE, Appellant.

St. Louis Court of Appeals, May 6, 1913.

1. **APPELLATE PRACTICE: Action for Maintenance: Conclusiveness of Finding.** In an action by a wife for maintenance, where the evidence is conflicting but is ample to sustain the finding in favor of the wife, the judgment based thereon will not be disturbed on appeal.

2. **MAINTENANCE: Sufficiency of Evidence.** In an action by a wife against her husband, who was worth about $20,000, for separate maintenance, evidence *held* to justify a judgment allowing her twenty dollars a month and $150 suit money.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

AFFIRMED.

D. C. Taylor for appellant.

Collins, Barker & Britton and *C. K. Rowland* for respondent.

ALLEN, J.—This is an action by a wife against her husband, for separate maintenance. The trial court found that plaintiff was entitled to recover of defendant, for support and maintenance, in the sum of $20 per month, and in the further sum of $150 as suit money; and judgment was entered accordingly. From this judgment the defendant has appealed.

Digitized by Google

It appears that the parties, who at the time of the trial were each about sixty-seven years of age, were married in St. Louis county in 1866. Eight children were born of the marriage, all of whom are grown. The record shows that in 1900 appellant went to Germany, and that he and respondent did not again live together until the year 1903. During this time respondent lived with a daughter, and it seems received no support from her husband. In 1902 appellant instituted a suit for divorce against respondent in the circuit court of St. Louis county. It appears that a decree of divorce was denied him, and in 1903 the parties became reconciled and took up their abode with an unmarried daughter who was keeping house in the city of St. Louis, and where they continued to live for several years. It seems that appellant agreed to pay the daughter eighteen dollars a month board for himself and wife, and did so for about eighteen months, and then ceased to pay anything; that they remained at this place until 1907, although it appears that for some time during the latter part of this period, they occupied separate rooms and were not on good terms. There was evidence that during this period appellant frequently refused to talk to respondent; that he would go away for days, and even for weeks at a time, without stating where he was going or giving any explanation concerning his absence, although there was evidence from which it might be inferred that he was away on business; that respondent during this period did work for her daughter, cared for a cow and sold milk and butter, and that she and her daughter worked for other people.

It seems that in December, 1907, appellant had a difficulty with his daughter over the matter of connecting a gas stove with her meter, and it seems that in trying to force open a door, and which the daughter endeavored to prevent, his hand was caught in the door and somewhat injured. It appears that the difficulty

Digitized by Google

lasted all day, resulting in the police being called in in the evening. Appellant then left the house. There was evidence that respondent was sick in another room of the house at the time.

Thereafter respondent remained at the home of this daughter until the following year, during which time it appears appellant gave her one dollar. After this time respondent, it seems, lived with first one of her children and then another, during which time appellant gave her twenty-five dollars and paid a hospital bill of fifty-two dollars, although there was evidence that appellant contributed something to a son for respondent's support during a part of this time, and he claims to have paid certain bills.

There is considerable testimony *pro* and *con* relating to the defense sought to be interposed by appellant to the effect that he was at all times ready and willing to support and care for respondent and to provide her a home, and that he frequently solicited respondent to go with him and live in the house which he owned at Ballwin, in St. Louis, county, but that she refused so to do. The evidence touching this question is contradictory, and there is ample in the record to justify the conclusion that such offers or solicitations as appear to have been thus made by appellant were not made in good faith. There is positive testimony on the part of respondent that on one occasion when she prepared to go with appellant to the old home in Ballwin he said to her, "You can go and I will stay here."

It would serve no useful purpose to set out the evidence in any great detail, or to discuss the elementary principles of law referred to in the briefs. It is established beyond question that appellant did not for many years by any means adequately provide for his wife's support and maintenance. In fact for long periods of time it appears he made no provision whatsoever therefor, and that he was not supporting her at the institu-

Digitized by Google

tion of the suit. The record discloses that he is worth something like $20,000. No declarations of law were asked, and none were given; and no error is assigned touching the admission and exclusion of evidence. There is ample evidence to sustain and justify the result reached by the lower court, and this court cannot disturb the judgment. And even though we were not bound by the finding of the trial court, a careful examination of the record convinces us that plaintiff, under the evidence, was entitled to a judgment for her separate maintenance, and that the court below properly determined the issues.

For the reasons given above the judgment of the circuit court should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

ALBERT R. CHAPPELL, Appellant, v. UNITED RAILWAYS COMPANY of St. Louis, Respondent.

St. Louis Court of Appeals, May 6, 1913.

1. **STREET RAILWAYS: Crossing Collision: Vigilant Watch: Failure to Stop Car: Evidence: Inferences.** An inference that the motorman of a street car was not keeping a vigilant watch ahead and did not use every effort to stop the car after danger became apparent could not be drawn from the fact that he failed to stop the car in time to avert a collision with a vehicle crossing the track, where the evidence showed that, when he could have first seen the vehicle, the car was only one hundred feet from the point of collision, but did not show within what distance the car, which was traveling at the rate of twenty-five or thirty miles an hour, could have been stopped.

2. **———: ———: "Vigilant Watch Ordinance:" Sufficiency of Evidence.** In an action for damages to an automobile in a collision with a street car at a street crossing, the evidence showed that, when the motorman could have first seen the automobile, the car was only one hundred feet from the point

Digitized by Google

of collision, but did not show within what distance the car, which was traveling at the rate of twenty-five or thirty miles an hour, could have been stopped, nor that the motorman was not keeping a vigilant lookout and did not make every effort to stop the car after the danger became apparent. *Held*, that a recovery could not be had under the "Vigilant Watch Ordinance" of the city of St. Louis, requiring motormen to keep a vigilant watch for persons and vehicles on the track or moving toward it, and, on the first appearance of danger, to stop the car in the shortest time and space possible, since, in order to warrant a recovery under this ordinance, it was necessary for plaintiff to show that the car, traveling at the rate it was, could have been stopped in time to have averted the collision, after the motorman could have seen the automobile.

3. ———: ———: **Failure to Stop: Negligent Speed.** The fact that a motorman of a street car makes every effort to avoid injury after discovery of the danger and finds it impossible to do so, will not excuse the street railway company if the motorman was guilty of prior negligence in running the car at an unlawful rate of speed and thereby created the impossibility.

4. ———: ———: ———: **Evidence: Inferences.** In an action for damages to an automobile in a collision with a street car at a street crossing, it was shown that, when the motorman could have first seen the automobile, the car was only one hundred feet from the point of collision, and that the car was traveling at the rate of twenty-five or thirty miles an hour when it was one hundred feet away and fifteen to eighteen miles an hour when the collision occurred. *Held*, that an inference could not be drawn that the car could have been stopped in time to have averted the collision.

5. **NEGLIGENCE: Contributory Negligence: How Established.** A plea of contributory negligence is an affirmative defense, the burden of establishing which rests upon defendant, but, in carrying this burden, defendant may avail himself of evidence offered by plaintiff, and it is not necessary that defendant introduce testimony to substantiate his plea.

6. **STREET RAILWAYS: Contributory Negligence: Failure to Look and Listen.** Street car tracks in a street are in themselves a signal of danger, and the law imposes upon one crossing them the duty of looking and listening, before going on them.

7. ———: **Crossing Collision: Contributory Negligence.** Where, in an action for damages to an automobile in a collision with a street car at a street crossing, defendant pleaded contributory

Digitized by Google

negligence of the driver, evidence by the driver that he knew the track crossed the street at the point in question, that, after passing a building that obstructed his view, he could see a car approaching, seventy-five to one hundred feet away, that the automobile was going very slowly, from three to four miles an hour and he could have stopped it in four or five feet, was sufficient to raise the issue of contributory negligence in failing to look or listen and authorize its submission to the jury, although he also testified that he looked and listened before going upon the track.

8. **EVIDENCE: Opposed to Physical Facts: Conclusiveness.** A witness' testimony is not conclusive, although no witness testifies to a contrary state of facts, especially where the physical facts tend to contradict it.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields,* Judge.

AFFIRMED.

Robert L. McLaran for appellant.

(1) Under the common law as well as under the city ordinances, it was the duty of the motorman to keep a vigilant watch for persons and vehicles, either on or moving towards the track. Sepetowski v. Transit Co., 102 Mo. App. 110; Riska v. Railroad, 180 Mo. 168; Sludder v. Transit Co., 189 Mo. 107; Deschmer v. Railroad, 200 Mo. 310. (2) The degree of care required depends upon the attendant circumstances and these may require the motorman not only to look ahead but also to have his car under control. In fact, to keep a vigilant watch means not only to look ahead in order to discover danger, but it means also that the motorman should be prepared to avert the danger, especially in those places where he has every reason to expect it. Frick v. Railroad, 75 Mo. 595; Hoverka v. Transit Co., 191 Mo. 441; Deitring v. Transit Co., 109 Mo. App. 524; Funck v. Street Railway Co., 133 Mo. App. 419; Qube v. Transit Co., 103 Mo. App. 582. (3) A greater degree of care is required at street cross-

Digitized by Google

ings than when running longitudinally in a street or between streets of a city. Frick v. Railroad, 75 Mo. 595. (4) No particular rate of speed is lawful, regardless of conditions. Holden v. Railroad, 108 Mo. App. 665; Beier v. Transit Co., 197 Mo. 215. (5) It is not necessary to prove by direct evidence that the motorman was not keeping a vigilant watch. This may be inferred from the circumstances. Batsch v. United Railways Co., 143 Mo. App. 58; Riska v. Railroad, 180 Mo. 168; Moore v. Transit Co., 194 Mo. 1. (6) Contributory negligence is an affirmative defense, and the burden of proving it rests upon the defendant. Weller v. Railroad, 164 Mo. 199; Latson v. Transit Co., 192 Mo. 451; Schmidt v. Railroad, 149 Mo. 269; Schroeder v. Transit Co., 111 Mo. App. 67; Hovarka v. Transit Co., 191 Mo. App. 441; Eckhard v. Transit Co., 190 Mo. 593. (7) In the absence of direct evidence or rebutting circumstances, one in attempting to cross a railroad track will be presumed to have been in the exercise of due care. Weller v. Railroad, 164 Mo. 198; Crumpley v. Railroad, 111 Mo. 157. (8) The doctrine of contributory negligence is qualified and limited by the "humanitarian doctrine." Latson v. Transit Co., 192 Mo. 451; Beier v. Transit Co., 197 Mo. 215. (9) The vigilant watch ordinance is simply a declaration of the "last chance or humanitarian doctrine." Gebhardt v. Transit Co., 97 Mo. App. 373. (10) No expert testimony was necessary to show that if the car had been under proper control and proceeding at a lawful rate of speed it could have been stopped in time to have avoided the accident. Latson v. Transit Co., 192 Mo. 449; Beier v. Transit Co., 197 Mo. 215. (11) If the failure to avoid the collision was due to the excessive and unlawful rate of speed at which the car was traveling, the defendant is still liable, although the car was stopped in the shortest time and space possible after the danger was discovered.

Digitized by Google

Williams v. Railroad, 149 Mo. App. 489; Murrell v. Railroad, 105 Mo. App. 88; Rapp v. Transit Co., 190 Mo. 144; Eswin v. Railroad, 96 Mo. 290.

Morton Jourdan and *Paul U. Farley* for respondent; *Boyle & Priest* and *T. E. Francis* of counsel.

(1) Plaintiff was not entitled to have his case submitted to the jury under the vigilant watch assignment or "last chance doctrine," for the reason that he failed to show that, at the speed at which the car was running, it could have been stopped after the motorman saw, or could have seen, the automobile in a position of danger. Zurfluh v. Railroad, 46 Mo. App. 636; Koegel v. Railroad, 181 Mo. 379; Theobald v. Transit Co., 191 Mo. 395; Dey v. Railroad, 140 Mo. App. 461; Paul v. Railroad, 152 Mo. App. 577; Roenfeldt v. Railroad, 180 Mo. 544; Guyer v. Railroad, 174 Mo. 344; Marcowitz v. Railroad, 186 Mo. 350; McGee v. Railroad, 214 Mo. 530; Hawkins v. Railroad, 135 Mo. App. 524. (2) The negligence of plaintiff's driver was a question for the jury under his own testimony, and defendant therefore had the right to have it submitted.

ALLEN, J.—This is an action to recover the value of an automobile belonging to appellant, which was struck by two of respondent's street cars at a public street crossing in the city of St. Louis and demolished. The cause was tried before the court and a jury, resulting in a verdict for defendant, and plaintiff appeals.

It appears that on January 5, 1908, at about 6:30 p. m., a young man was riding in and driving plaintiff's automobile and was proceeding in a southerly direction along Clarendon avenue, a public street in the city of St. Louis, approaching the intersection of said street with the street railway tracks of defendant.

Digitized by Google

Through this portion of the city this line of defendant's street railway is operated over a private right of way, except where the tracks intersect the streets. In approaching and crossing Clarendon avenue from the east, the tracks, instead of continuing west, curve toward the north. In crossing this street they extend in a general direction from southeast to northwest, and after crossing it continue to curve toward the north. There are two tracks of defendant at this crossing. Its westbound cars run on the northern track, and its eastbound cars on the southern track. In going south on Clarendon avenue, and while crossing the first or northern track, plaintiff's automobile was struck by a westbound car, and pushed along the tracks for some twenty feet, when it was also struck by an eastbound car on the other track, and crushed between the two cars and demolished.

Plaintiff pleads what is known as the "vigilant watch ordinance" which provides that those operating the car shall keep a vigilant watch for all vehicles and persons on foot, either on the track or moving toward it, and on the first appearance of danger to such vehicles or persons, the car shall be stopped in the shortest time and space possible; which ordinance also provides that all street cars after sunset shall be provided with signal and headlights, and that no car shall be drawn or propelled at a speed greater than fifteen miles per hour in that portion of the city in which defendant's car was being operated at the time. And plaintiff charges that the defendant's employees and agents in charge and control of its car negligently and unlawfully ran and operated the car, as it approached Clarendon avenue, "at a very high, negligent and unlawful rate of speed, to-wit, at the rate of about twenty-five miles per hour." It is also averred in the petition that it was dark at the time, and that defendant, its agents and employees, negligently failed to have any headlight or other signal light

Digitized by Google

lighted and burning on the car, negligently failed to ring any bell or sound any gong or otherwise give warning of the approach of the car as it neared Clarendon avenue, negligently failed to keep a vigilant watch for vehicles or persons on foot who might be on the track or moving towards it, and negligently failed to stop or check the speed of the car, in the shortest time and space possible, when they saw the dangerous situation of plaintiff's said automobile and the occupants thereof.

The answer is a general denial, coupled with the averment that whatever damages, if any, plaintiff sustained, were caused by the negligence and carelessness of plaintiff's driver in charge of plaintiff's automobile. The reply denies the allegations of the negligence of plaintiff's driver contained in the answer.

Inasmuch as the assignments of error pertain only to the giving and refusing of instructions, it would serve no useful purpose to review the evidence further than to refer to such portions thereof as are material to the questions before us, and which we shall do in considering the instructions in the case.

At the close of plaintiff's case defendant, after offering a peremptory instruction in the nature of a demurrer to the evidence, which was refused by the court, stood upon its demurrer and offered no evidence.

I. The first error assigned is the refusal of the court to give, as offered, an instruction at the request of plaintiff, to the effect that if the jury believed from the evidence that the agents and servants of defendant in charge and control of its car failed to use and exercise ordinary care in the operation thereof, under the existing circumstances, "either by operating said car at an excessive rate of speed having regard to the crossing which it was then approaching, or by failure to sound a gong or ring a bell or give some

Digitized by Google

other warning to the driver of said automobile as it approached Clarendon avenue, *or by failing to keep a vigilant watch for all vehicles or persons on foot either on the track or moving towards it or by failing on the first appearance of danger to the plaintiff's automobile to stop its car or cars in the shortest time and space possible,"* etc., then, finding that the person in charge of plaintiff's automobile exercised ordinary care in the premises, the verdict should be for plaintiff.

The court refused to give this instruction as offered, but modified it by striking out the words which we have italicized above, and gave it as modified. Appellant insists that this was error. His contention in this regard is, that there were facts and circumstances in the case from which the jury might have properly inferred that the motorman was not keeping a vigilant watch, or was negligent with respect to stopping the car, and that plaintiff was therefore entitled to go to the jury upon this assignment of negligence, as well as upon those embraced within the instruction as given.

Appellant says that the vigilant watch ordinance is declaratory of the humanitarian doctrine, and respondent says that this is correct; but from an examination of the evidence we are of the opinion that this doctrine has no place in the case, and that a recovery cannot be had upon the assignment of negligence in question. There was evidence of negligent speed of the car, of failure to have the car equipped with a headlight or signal light, and of failure to sound a gong or give other warning of the approach of the car, sufficient to take these questions to the jury; and they were submitted to the jury by this instruction. We think, however, that the evidence failed to bring the case within the rule entitling plaintiff to have submitted to the jury the question of the negligence of defendant's agents and servants in charge of its car in failing to keep a vigilant watch or in failing to stop

Digitized by Google

the car after discovering the dangerous situation of the automobile.

As we have said, the tracks curve on both sides of this crossing, and plaintiff's evidence shows that there was a building on the corner of the street, at its intersection with defendant's right of way, obstructing the view to the east until one is within a few feet of the track; that, due to the obstruction and the curvature of the tracks, one approaching the track from the north, as was plaintiff, could not see a car approaching from the east at any great distance. The most favorable view of the testimony of plaintiff's driver is that, after one passed the building line, he could see a car to the east one hundred feet from the point of the collision, and consequently this must be taken to mean that the motorman could not have seen the automobile in a position of danger more than about one hundred feet from it. The testimony of plaintiff's driver was that defendant's car was running from twenty-five to thirty miles per hour. The testimony of the other witnesses throws but little light upon the question of the speed of the car. Miss Bessie Turner, who was an occupant of the automobile, testified that the car was going very fast. Another witness testified that he saw the car just about the time that it struck the automobile, and he judged that at about the time of the collision it was going fifteen to eighteen miles per hour. His testimony however affords no satisfactory basis from which to determine the speed of the car when it was about one hundred feet away.

There is no actual testimony whatsoever that the motorman was not keeping a vigilant lookout, or did not use every effort to stop the car after the danger became apparent; and the question is purely whether, from the facts and circumstances in evidence, it could be inferred that the motorman was negligent in either respect. Such inference could only be drawn from the fact that he did not stop the car in time to avoid the

Digitized by Google

collision; but this inference is not here available to plaintiff for the reason that there is not a scintilla of evidence to show within what distance the car could have been stopped, going at the rate of speed indicated by plaintiff's evidence. Under the evidence, to justify the submission of the case upon this theory it was necessary for plaintiff to show that the car, going at the rate of speed which his evidence tends to show that it was traveling, could have been stopped within such distance as it appears that the motorman could have seen the automobile. Evidently if the car could not have been stopped within such distance, defendant's agents and servants in charge thereof could not be held to be guilty of negligence in failing to stop it (whatever may have been their negligence in respect to the speed of the car, or in failing to sound a warning of its approach), and plaintiff's loss could not be said to be due to a failure to keep a vigilant watch.

Upon this question we cannot do better than to quote from the opinion in Dey v. United Railways Co., 140 Mo. App. 461, 120 S. W. 134, concerning the application of the so-called humanitarian doctrine to a like situation, where this court speaking through NORTONI, J., said:

"From the doctrine thus stated, it is obvious that it may not be invoked in any case unless it appears that defendant could have averted the injury after the injured person is either seen, or by the exercise of ordinary care could have been seen, either in or about to come into a position of peril. Therefore, where it is obvious that the motorman could not have averted the injury after the perilous situation of the plaintiff was revealed, or might have been discovered by him by the exercise of ordinary care to that end, the doctrine of the last clear chance does not obtain. [Roenfeldt v. St. L. & Sub. Ry. Co., 180 Mo. 554; Rissler v. St. Louis Transit Co., 113 Mo. App. 210; Boyd v. Wabash Ry. Co., 105 Mo. 371.] . . . There is

Digitized by Google

not a syllable of testimony in the case tending to show in what distance a car, running at the rate of fifteen miles an hour, as was this one, could have been stopped by employing the appliances at hand for the purpose, and with due care for the safety of those upon the same. . . . Where it is obvious that the motorman may not stop the car or avert the injury by exercising ordinary care to that end, the last clear chance or humanitarian doctrine does not obtain."

In this connection see, also, Markowitz v. Railroad, 186 Mo. 350, 85 S. W. 351; Theobald v. Transit Co., 191 Mo. 396, 90 S. W. 354; McGee v. Railroad, 214 Mo. 530, 114 S. W. 33; Ellis v. Metropolitan Street Railway, 234 Mo. 657, 138 S. W. 23; Burge v. Railroad, 244 Mo. 76, 148 S. W. 925; Hawkins v. Railroad, 135 Mo. App. 524, 116 S. W. 16.

It is true, as appellant suggests, that although defendant's agents and servants used every effort to avoid the injury after discovering the dangerous position of plaintiff's automobile and found it impossible to do so, nevertheless that will not excuse the defendant, if its agents and servants were guilty of prior negligence which created the impossibility. That is to say, if the motorman was unable to stop the car because of negligence in running it at an unlawful rate of speed, thereby disabling himself from so stopping it, defendant is not excusable from liability. [See Williams v. Railroad, 149 Mo. App. l. c. 491, 131 S. W. 115, and cases cited.] But this does not affect the question before us; for the instruction with which we are dealing authorizes a recovery on the ground of the negligent speed of the car, thereby submitting this question to the jury.

The contention is also made that "no expert testimony was necessary to show that, if the car had been under such control and proceeding at such a reasonable rate of speed, as the dangerous character of the crossing required, it could have been stopped in time

Digitized by Google

to avoid the accident." In this connection we are referred to the cases of Latson v. Transit Co., 192 Mo. 449, 91 S. W. 109, and Beier v. Transit Co., 197 Mo. 215, 94 S. W. 876. In the Latson case it was said that no expert testimony was necessary to show that a car traveling at the rate of six and one-half or seven miles an hour could have been stopped in a distance of forty feet. In the Beier case there was evidence that the car was actually stopped in its own length plus eight or ten feet. In the case before us the facts in evidence are not such as to justify the inference that the car could have been stopped within the distance at which it appears the motorman might have discovered the automobile, and there is no positive testimony touching this question whatsoever.

Our conclusion is, that the court did not err in modifying plaintiff's instruction in the manner indicated above. This also disposes of the assignment of error with respect to the giving of an instruction for defendant to the effect that plaintiff was not entitled to recover on the assignment of negligence which we have just been discussing.

II. The remaining assignment of error pertains to the giving of an instruction offered by defendant telling the jury that it was the duty of the driver of plaintiff's automobile to look and listen for the approach of cars before going on the track, and that if the jury found from the evidence that, when the driver approached the track, "if he had looked he could have seen the car approaching, or if he had listened could have heard the car approaching, and that he drove upon the track without looking, or, if he did look, without heeding what he saw, and without listening, or without heeding what he heard," then plaintiff was not entitled to recover.

Appellant urges that this instruction should not have been given, for the reason, as he says, that con-

Digitized by Google

tributory negligence is an affirmative defense and the burden of proving the same rested upon the defendant; and further that there was no evidence of contributory negligence on the part of the driver.

We think that there was no error in giving this instruction. The pleadings made the question of the contributory negligence of the driver of plaintiff's automobile an issue in the case. It was, of course, an affirmative defense, and the burden of establishing it was on the defendant. Nevertheless in carrying that burden it was not essential that defendant introduce testimony of its own. If plaintiff's own proof tended to establish such contributory negligence, it was available to defendant in support of the allegations of its answer. And we think that it cannot be said that there was no evidence in plaintiff's case of the driver's contributory negligence. Plaintiff seems to have recognized that there was evidence from which it might be inferred that plaintiff's driver was negligent in the premises, for plaintiff very properly submitted that issue in the instruction which it requested the court to give. Plaintiff's driver testified that he knew the tracks crossed the street at this point. They were of course a signal of danger, and the law imposed upon him the duty of looking and listening before going upon them.

While there was direct testimony that the driver looked in both directions, and listened, before going upon the tracks, there were circumstances in evidence from which the inference may be drawn that he did not look and listen, or did not heed what he saw and heard. It appears that the building which obstructed the view to the east stood some ten or twelve feet back from the tracks. The driver of the automobile testified that after passing the building line one could see a car from seventy-five to one hundred feet away. He further testified that the automobile was going very slowly—about three or four miles per hour—and

Digitized by Google

could have been stopped in four or five feet. His failure to stop it, and thus avoid the collision, under the circumstances in evidence, was a matter to be taken into consideration in connection with the testimony that he looked and listened before going on the tracks. The latter testimony was, of course, not conclusive. [See Gannon v. Laclede Gas Light Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907.] And especially since the physical facts must be said to have had some tendency at least to contradict it. In our judgment the facts and circumstances in evidence were sufficient to warrant the giving of this instruction.

A careful examination of the record reveals no reversible error, and hence the judgment of the circuit court must be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

PAUL BLIESNER, by Next Friend, Respondent, v. G. RIESMEYER DISTILLING COMPANY, Appellant.

St. Louis Court of Appeals, May 6, 1913.

1. **MASTER AND SERVANT: Appliances: Duty of Master.** It is the duty of the master to furnish a servant with reasonably safe appliances with which to work.

2. **———: Injury to Servant: Appliances: Duty of Master.** In determining whether a master was negligent in not furnishing a servant with a reasonably safe appliance with which to work, the master need not have anticipated the very injury complained of, nor that it would have occurred exactly as it did, but it is sufficient if his negligence was the proximate cause of the injury resulting from the servant's use of the appliance.

3. **———: ———: ———: ———: Question for Jury.** In an action by a servant for injuries received as a result of putting his finger into the cylinder of a corking machine, the edges of which were rough, for the purpose of removing small par-

Digitized by Google

ticles of cork which were lodged therein, *held* that a reasonably prudent man would have anticipated that injury might occur by reason of the defect, and that the question of the master's negligence was, therefore, for the jury.

4. ———: ———: **Simple Appliance Doctrine: Applicability.** A master cannot be relieved from liability for injury to a servant on the ground that the instrumentality causing the injury was a simple appliance and that danger did not inhere in the appliance itself but arose from the manner in which it was used, where the injury occurred from the use of the appliance in the manner that the master expected and required the servant to use it.

5. ———: **Assumption of Risk.** A servant never assumes the risk of the master's negligence, but only such risks as are incident to the employment after the performance by the master of that which the law requires of him.

6. ———: **Dangerous Appliances: Contributory Negligence.** Mere knowledge on part of the servant of the danger of using a defective instrument or appliance will not preclude a recovery by him on the ground of contributory negligence, unless the danger is so obvious and imminent that a man of ordinary prudence would, under the circumstances, refuse to continue to work with the instrumentality; and whether the danger was so obvious and imminent as to make him guilty of contributory negligence is a question for the jury unless the evidence so conclusively shows such to be the fact that reasonable men could not differ with respect thereto.

7. ———: ———: ———: **Master's Promise to Repair.** Notwithstanding the fact that the defect or danger in an appliance is known to the servant, yet if he complains thereof to the master and the latter promises to repair the defect or remove the danger, the servant may recover for an injury resulting therefrom within such period as would be reasonable to allow the master for the performance of his promise.

8. ———: ———: ———: ———. Where a servant continued working with a machine after complaint to the master of its defects, and it could be reasonably inferred from the evidence that he was induced so to do by the promise of the master to remedy it, whether such was the inducement was a question for the jury.

9. ———: ———: ———: ———: **Sufficiency of Evidence.** In an action by a servant for injuries received from a defective appliance, evidence that plaintiff notified defendant's foreman of the defect and that the latter told him to continue using the appliance as he had been doing until another one could

Digitized by Google

be supplied him free from the defect complained of, *held* tantamount to a promise to repair.

10. ———: ———: ———: **Question for Jury.** Evidence, in an action by a servant against the master for negligence in furnishing him with a dangerous appliance with which to work, resulting in injury to him, *held* to present a question for the jury, whether the servant was guilty of contributory negligence by continuing to work with the appliance after he had knowledge of its danger.

11. **INSTRUCTIONS: Defects and Omissions: Cure by Other Instructions.** Where an instruction for plaintiff in a negligence case, purporting to cover the entire case and authorizing a recovery if certain facts were found, omitted to require certain findings essential to a recovery by plaintiff and ignored the defense of contributory negligence, but, in instructions given for defendant, the facts omitted were supplied and one on contributory negligence was properly given, the error was thereby cured, since, in determining the correctness of an instruction, the whole charge should be considered.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench,* Judge.

AFFIRMED.

Schnurmacher & Rassieur and *Wilfred Hearn* for appellant.

(1) The demurrer to the evidence should have been sustained: (a) Because there was no substantial evidence of negligence on the part of the defendant. The tool was simple, the use to which it was to be put was simple and the alleged danger apparent and known to plaintiff. Halloron v. Iron Foundry Co., 133 Mo. 470; Blundell v. Manufacturing Co., 189 Mo. 552; Boring v. Medart, 56 Mo. App. 443; Crismer v. Bell Tel. Co., 194 Mo. 209; Mathis v. Stock Yards Co., 185 Mo. 447; Steinhauser v. Spraul, 127 Mo. 562; Harris v. Railroad, 146 Mo. App. 524; Blanton v. Dold, 109 Mo. 64; Fugler v. Bothe, 117 Mo. 475; Moore v. Wire Mill Co., 55 Mo. App. 491; Watson v. Coal Co., 52 Mo. App. 366; Nolan v. Shickle, 3 Mo. App. 300; Lewis v. Rail-

Digitized by Google

road, 76 Mo. 86; Dutzi v. Geisel, 23 Mo. App. 676. (b) Because the proof shows that the injury complained of was due to plaintiff's own contributory negligence. Stegmann v. Gerber, 146 Mo. App. 104; Epperson v. Cable Co., 155 Mo. 346; Doerr v. Brewing Assn., 176 Mo. 547; Fugler v. Bothe, 117 Mo. 475; Holloran v. Iron & Fdy. Co., 133 Mo. 470; Knorpp v. Wagner, 195 Mo. 637; Holmes v. Bradenbaugh, 172 Mo. 53; Harris v. Railroad, 146 Mo. App. 542; Hogan v. Railroad, 150 Mo. 36; Lucey v. Oil Co., 129 Mo. 32; Winkler v. Basket Co., 137 Mo. 394; Junior v. Power Co., 127 Mo. 82. (c) Because there was a safe method of removing the pieces of cork, yet plaintiff chose another method, admitted by him to be dangerous. Montgomery v. Railroad, 109 Mo. App. 88; Harris v. Railroad, 146 Mo. App. 524; Anderson v. Box Co., 103 Mo. App. 382; Moore v. Railroad, 146 Mo. 572; Smith v. Box Co., 193 Mo. 715; Holmes v. Brandenburg, 172 Mo. 66. (2) The court erred in giving instruction No. 1 at its own motion. (a) Because it purports to be complete in itself and authorizes a recovery upon a finding of the facts therein set forth, regardless of the other facts necessary under the law to entitle plaintiff to a recovery; and it also ignores the defense of contributory negligence in support of which proof was offered. Shoe Co. v. Lisman, 85 Mo. App. 340, 344; Flucks v. Railroad, 143 Mo. App. 17; Ross v. Railroad, 132 Mo. App. 472. (b) Because it authorizes a recovery upon a finding merely that the tool in question was defective, when the master's duty is satisfied by furnishing tools which are reasonably safe. Glasscock v. Dry Goods Co., 106 Mo. App. 657. (c) Because it submitted to the jury an issue not justified by the pleadings and evidence, viz., that of a promise to repair and reliance thereon inducing plaintiff to continue the use of the tool. Coin v. Lounge Co., 222 Mo. 489; Holloran v. Iron & Fdy. Co., 133 Mo. 470; Ryan v. Box Co., 156 Mo. App. 693; Yerkes v. Rail-

Digitized by Google

road, 88 N. W. (Wis.) 33. (3) Because the court refused to give, at the request of defendant, its instruction No. 5, and in giving the same as modified by the court. Glasscock v. Dry Goods Co., 106 Mo. App. 663; Holloran v. Iron & Foundry Co., 133 Mo. 470.

George A. Davis and *A. C. Ketring* for respondent.

ALLEN, J.—This is an action by a servant against the master for personal injuries received in the course of the employment. When injured, plaintiff, a young man twenty years of age, was engaged in corking bottles for the defendant distilling company, using what is called a hand corker, consisting of a tube or cylinder with a plunger, for inserting corks in bottles. The instrument in question was operated entirely by hand. It is claimed by plaintiff that the cylinder of the corking machine he was using was defective, in that it was worn so that the edge of the metal portion of it, which it seems was of brass, was rough, having, as plaintiff said, little "burrs" or projections on it; and that in performing his work he injured his finger by reason of the defects in the instrument aforesaid, whereby it became infected, resulting in blood poisoning.

The cause originated before a justice of the peace, and the statement filed charges, in substance, that defendant negligently permitted the machine in question to become out of repair so as to be dangerous for use, which defendant knew, or by the exercise of ordinary care would have known; that by reason of the dangerous condition of the machine, plaintiff's hand was injured, and because of said injury blood poisoning set in, etc. There was judgment for plaintiff before the justice, and defendant in due time appealed to the circuit court, where a trial was had before the court and a jury, resulting in a verdict for plaintiff. Judg-

Digitized by Google

ment was entered accordingly, and defendant has appealed to this court.

The evidence discloses that in operating the instrument in question, small pieces of cork would remain in the tube after inserting a cork in a bottle, which had to be removed before the corker was again used. Plaintiff was in the habit of inserting his little finger in the cylinder thereof, in order to remove these pieces of cork. It appeared that there was a small wire contrivance which might be used for this purpose. Plaintiff testified, however, that to use the latter took too much time, and that he was instructed by his foreman to use his finger therefor, the foreman saying, "You have to get it out that way, by using your finger."

The plaintiff testified that he knew there was danger in using the instrument in its defective condition; that he objected to using it because of these defects, but that defendant's foreman told him that others were being repaired, and directed plaintiff to use this one until the others were available. The foreman denied that he told the plaintiff to take the pieces of cork out of the tube with his finger; and testified that they could be removed by a stick or be blown out. He admitted, however, that when using the corker he ordinarily cleaned it out with his finger. He did not deny that plaintiff objected to using the corker in the condition in which it was, or that he told plaintiff, in effect, that another would be supplied him. Another witness, Gustave Riesmeyer, Jr., connected with defendant company, testified that he ordinarily used his finger to remove such pieces of cork from the tube, though it was possible to do so by means of a small stick or wire or by strking the corker sharply against something.

The assignments of error pertain to the overruling of a peremptory instruction in the nature of a demurrer to the evidence at the close of plaintiff's case, and

Digitized by Google

again at the close of the entire case, and to the matter of giving and refusing instructions.

I. With respect to the court's refusal to give defendant's peremptory instruction in the nature of a demurrer to the evidence, the chief insistence appears to be that the evidence showed that plaintiff was guilty of negligence as a matter of law precluding a recovery; although it is urged that there was no substantial evidence of negligence on the part of the defendant. As to the latter we may say that it was, of course, defendant's duty to furnish his servant with reasonably safe appliances with which to perform his work, and it would seem that a reasonably prudent man should have anticipated that some injury might occur by reason of the defects in the instrument. "It is not essential that defendant could have anticipated the very injury complained of, or that it would have anticipated that it would have occurred in the exact manner in which it did occur, but it is sufficient if the negligence of the defendant was the proximate cause of the injury." [Buckner v. Horse & Mule Co., 221 Mo. l. c. 710, 120 S. W. 766; Dean v. Railroad, 199 Mo. l. c. 411, 97 S. W. 910; Benton v. City of St. Louis, 154 S. W. 477, and cases cited.]

II. Appellant insists that the instrument in question was a very simple one, and that any danger therefrom arose from the manner in which it was used, rather than from any defects or deficiencies in the appliance itself. And in this connection we are referred to the recent decision of this court in Harris v. Railroad, 146 Mo. App. 524, 124 S. W. 576, where the injuries in question were received by reason of a defective clawbar, as well as to other cases of that character. But we think that the case before us does not fall within the doctrine of such cases. As pointed out in

Digitized by Google

the Harris case, there are numerous cases in this State in which the master has been held liable for a negligent breach of his duty in respect to furnishing a reasonably safe appliance, although the latter was simple and for a simple purpose. [See Harris v. Railroad, supra, l. c. 536, and cases cited.] It will be seen that in the case to which we have just referred a recovery was denied on the ground that the danger involved did not inhere in the appliance itself, but arose from the mode and manner in which it was used; the servant voluntarily choosing an unsafe method of using it rather than a safe one. It is urged that this is true in the case before us, in that plaintiff's injury resulted from using his finger to remove pieces of cork instead of adopting another means for so doing; but we think that the facts take the case out of the doctrine to which we have just alluded. This for the reason that there was evidence from which it may be reasonably inferred that plaintiff was expected and required to use the instrument in question in the manner in which he did. It appears that this was the way in which such pieces of cork were ordinarily removed, and plaintiff testified that he was instructed by the foreman to remove them in this manner; the foreman saying, "You have to get it out that way, by using your finger." Plaintiff testified that too much time would be consumed in doing it in another way, and from the facts in evidence we may reasonably conclude that, for this reason, plaintiff, in performing his work, was required to use his finger for the purpose mentioned.

III. There being evidence of negligence on the part of the defendant, with respect to the appliance furnished, recovery cannot be denied plaintiff on the ground of *assumption of risk,* upon the theory that he knew of the defective appliance and continued to use it; but the question to be determined is whether the plaintiff is thereby guilty of *contributory negligence*

Digitized by Google

precluding a recovery. [Jewel v. Bolt & Nut Co., 231 Mo. 176, 132 S. W. 703; Cole v. Transit Co., 183 Mo. 81, 81 S. W. 1138; Curtis v. McNair, 173 Mo. 270, 73 S. W. 167; Cole v. Jones, 159 Mo. App. 472, 141 S. W. 689; Delo v. Old Dominion Mining Co., 160 Mo. App. 38, 141 S. W. 687; and cases cited.] It is now well established in this State that the servant never assumes the risk of the master's negligence, but only such risks as are incident to the employment after the performance by the master of that which the law requires of him. [Jewel v. Bolt & Nut Co., supra; Cole v. Transit Co., supra; Curtis v. McNair, supra; Cole v. Jones, supra; Delo v. Old Dominion Mining Company, supra; McMurray v. Railroad, 225 Mo. 272, 125 S. W. 751; Holloran v. Foundry Company, 133 Mo. 470, 35 S. W. 260.]

IV. The propriety of the action of the trial court in overruling defendant's demurrer to the evidence, and submitting the case to the jury, depends then upon whether or not plaintiff should be held to have been guilty of contributory negligence as a matter of law. Mere knowledge on the part of the servant of the danger incident to using a defective instrument or appliance will not preclude a recovery by the servant unless the danger is so obvious and imminent as to portend calamity, so that a man of ordinary prudence would, under the circumstances, refuse to do the master's bidding and to continue to work with the instrumentality in question; and whether the danger was so obvious and imminent as to make the servant guilty of contributory negligence, is, in general at least, a question for the jury. [Brands v. St. Louis Car Co., 213 Mo. 707, 112 S. W. 511, 18 L. R. A. (N. S.) 701; George v. Railroad, 225 Mo. 364, 125 S. W. 210; Burkard v. Rope Co., 217 Mo. l. c. 481, 117 S. W. 40; Cole v. Jones, 159 Mo. App. 472, 141 S. W. 689.] Certainly it is for the jury, unless the evidence so conclu-

Digitized by Google

sively shows the danger to have been so obvious and imminent that no prudent man would have incurred the risk that minds of reasonable men could not differ with respect thereto.

V. And notwithstanding the fact that the defect or danger is known to the servant, yet if he complains thereof to the master, and the latter promises to repair the defect or remove the danger, the servant may recover for an injury thereby caused within such a period as would be reasonable to allow the master for its performance. This is firmly established in the law of this State. [Holloran v. Iron & Foundry Co., 133 Mo. 470, 35 S. W. 260; Buckner v. Horse & Mule Co., supra, and cases cited.]

Concerning this question, however, it is insisted by appellant that even though such promise was made, it does not appear to have been the inducement to plaintiff to remain in the service of the defendant and without which he would have quit, and hence avails plaintiff nothing. In support of this theory we are cited to Coin v. Lounge Co., 222 Mo. l. c. 514, 121 S. W. 1, and authorities there cited. It is true that this doctrine appears to have the sanction of our Supreme Court; but an examination of the authorities upon which appellant relies in this regard discloses that they are cases in which the only reasonable inference from the testimony was that the servant did not continue work because he relied upon the master's promise. If it may be reasonably inferred from the evidence that plaintiff continued in the work in reliance upon the promise of the master, then we take it that whether or not he so continued in reliance thereupon is a question for the jury. There need not be a formal notification that the servant will quit the service unless the defects be repaired or remedied. "It is sufficient if, from the circumstances of the case, it can be fairly inferred that the servant is complaining on

Digitized by Google

his own accord, and that he was induced to continue in the service by reason of the promise. It is ordinarily for the jury to say whether the servant's reliance upon a promise by the master induced him to continue work." [1 Labatt on Master and Servant (1904), sec. 421, and authorities cited.] Here we think the evidence such that this question became one for the jury, and it was properly submitted by an instruction.

VI. Under the testimony before us in the record, the case is not without its difficulties, yet a consideration of all the principles involved leads us to the conclusion that plaintiff's evidence was sufficient to entitle him to a submission of his case to the jury. As we have said above, it was defendant's duty to furnish a reasonably safe appliance. And failure so to do was negligence on its part. There is evidence that the appliance furnished plaintiff to work with was worn and defective, and its condition such that the jury might fairly find that it was not reasonably safe for use, for the purposes for which it was intended; that discovering its defective condition, plaintiff notified the defendant's foreman thereof and the latter told him to continue using it as he had been doing until another corking machine could be supplied him free from the defects in question. While this was not a direct promise to repair, or to replace the instrument by one free from such defects, it was tantamount to a promise that this would be done; and the evidence is sufficient from which the jury may conclude that plaintiff relied upon such promise and assurance on the part of the foreman, in continuing to work with the appliance. We think that the evidence did not show that plaintiff was guilty of contributory negligence, as a matter of law, and that the trial court did not err in overruling the demurrer to the evidence.

Digitized by Google

VII. Of its own motion the court instructed the jury, in substance, that if they found from the evidence that the corking machine in question was out of repair and in a defective or dangerous condition, at the time of plaintiff's injury, and that defendant or its foreman knew of such defective or dangerous condition thereof, and that plaintiff theretofore called the foreman's attention to the same and objected or protested against using the machine in that condition, and that thereupon defendant or its foreman assured or promised plaintiff that within a short time thereafter plaintiff would be furnished with another machine in good condition, and that until furnishing the latter plaintiff should continue the use of the machine in question; and that if the jury further find that plaintiff relied upon such promise, and that in reliance thereupon he continued to work with the machine in question, and that while operating and using it the little finger of his right hand was injured, etc., then plaintiff was entitled to recover.

It is insisted that this instruction is erroneous, because it purports to cover the entire case, and authorizes a recovery for plaintiff, while it omits, as appellant says, facts necessary under the law to entitle plaintiff to recover. The real attack upon this instruction is (1) that it authorizes a recovery if the machine was in a defective or dangerous condition, without qualifying these terms by telling the jury that the requirement was only to furnish an instrument which was reasonably safe, and (2) in ignoring the defense of contributory negligence.

The objection to this instruction we consider to be without merit, for the reason that those matters which appellant claims should have been included therein are fully covered in other instructions given on behalf of the defendant. The instructions for plaintiff and defendant respectively cannot be said to be contradictory. The instruction here complained of,

Digitized by Google

which directed a verdict for plaintiff, was defective in that it omitted to require certain findings essential to plaintiff's recovery. Such omissions, however, were fully supplied by defendant's instructions, whereby the error was cured. [See Meily v. Railroad, 215 Mo. l. c. 589, 114 S. W. 1013; Lange v. Railroad, 208 Mo. l. c. 477, 106 S. W. 660; Hughes v. Railroad, 127 Mo. l. c. 452, 30 S. W. 127; Meadows v. Life Ins. Co., 129 Mo. l. c. 97, 31 S. W. 578; Owens v. Railroad, 95 Mo. l. c. 181, 8 S. W. 350; Johnston v. Railroad, 150 Mo. App. l. c. 323, 130 S. W. 413; Wright v. Mining Co., 163 Mo. App. 536, 147 S. W. 213; Jackson & Co. v. Western Union Telegraph Co., 174 Mo. App. 70, Had the error in plaintiff's instruction not been thus cured by defendant's instructions, it seems that such error would have been one not merely of nondirection but of misdirection, inasmuch as plaintiff's instruction purported to cover the entire case and directed a verdict.

In the case of Riegel v. Loose-Wiles Biscuit Co., 169 Mo. App. 513, 155 S. W. 59, recently decided by the Kansas City Court of Appeals, although the pleadings and evidence made contributory negligence an issue in the case, an instruction was given at the request of plaintiff submitting the different hypotheses of fact as claimed by him and directing a verdict, wholly omitting the qualification of contributory negligence. Defendant did not ask an instruction on the issues of contributory negligence, and the latter was therefore entirely taken out of the case by plaintiff's instruction. This was held to be fatal error, and many decisions of our courts were cited in support of such ruling. But the authorities there referred to do not, in our opinion, in any wise alter the rule that such an error in an instruction for plaintiff will be cured by an instruction or instructions given on behalf of defendant supplying the omission. In fact the Riegel case distinctly recognizes the doctrine of the cases

Digitized by Google

which we have cited above to the effect that such error may be cured by defendant's instructions. In the case before us, taking the instructions as a whole, as they should be taken, they may be said to fairly cover the law of the case applicable to the facts in evidence.

VIII. We need to refer to but one further instruction, this being one requested by defendant, and given after being modified. As requested to be given this instruction was as follows:

"The court instructs the jury that even if they shall find and believe from the evidence that the corking machine with which plaintiff worked was out of repair and dangerous to use, yet if the jury shall also find and believe from the evidence that plaintiff knew the machine was out of repair and understood and appreciated the danger of using it in such condition, and continued to do so, then plaintiff cannot recover."

The court refused to give the instruction as offered, but modified it by adding the following:

"Unless the jury shall further find from the evidence that plaintiff continued the use of such machine in reliance upon a promise of defendant to have the same repaired, or to furnish a better one in place thereof, provided plaintiff would continue the use of the machine in question for the time being."

There was no error in so modifying this instruction. This follows from what we have said above as to the law of the case. The defendant was not entitled to an instruction to the effect that mere knowledge on the part of plaintiff of the danger of using the defective appliance would preclude his recovery. The reason for this is apparent from what we have hereinbefore said.

IX. We have very carefully examined the record, and fully considered the numerous authorities to which we have been referred by learned and diligent coun-

Digitized by Google

sel for appellant. We have not been favored with a brief on the part of respondent, but from a review of the evidence and the principles of law applicable thereto we think that the case made by plaintiff entitled him to go to the jury. We have found no reversible error in the instructions under which the court below submitted the issues, and no question is raised as to the amount of the verdict. We are, therefore, of the opinion that the judgment ought to be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

STATE OF MISSOURI, Respondent, v. THOMAS SHORTELL, Appellant.

St. Louis Court of Appeals, May 6, 1913.

1. **INDICTMENTS AND INFORMATIONS: Statutory Offense.** Where an indictment or information is based on a statute creating an offense unknown to the common law, it must set forth and charge all the constitutive facts required by the statute to constitute the offense and necessary to bring the accused fully within its provisions.

2. **STATUTES: Construction: Considering Other Statutes.** A statute should not be construed as if it stood alone—as being complete in itself and unaffected by other statutes, but all consistent statutes should be construed together, as constituting one act.

3. ———: ———: **Considering Title.** It is proper to consider the title of an act as an aid in construing its provisions.

4. ———: ———: **Criminal Statutes.** Criminal and penal statutes are to be strictly construed in favor of accused and against the State, both as to the charge and the proof.

5. **FOOD: Sale of "Imitation Butter:" Sufficiency of Information: Statute Construed.** Art. 4 of Chap. 4, R. S. 1909, establishes a bureau of dairying and relates to dairy products and imitations. Section 650 defines "imitation butter," "for the purposes of Sec. 650 to 662," to include every article, substitute or compound, other than that produced from pure milk or cream from the same, made in the semblance of butter and

Digitized by Google

designed to be used as a substitute therefor. Section 657, which purports to prohibit "offering imitation butter for sale," provides that no person shall sell or offer for sale any substance designed to be used as a substitute for butter under the name of or under the pretense that the same is butter. *Held*, that sections 650 and 657 must be read together, evidencing a legislative intent to prohibit, by the latter section, the sale of "imitation butter," as defined by the former; and hence an information, charging that defendant sold and offered for sale a substance designed to be used as a substitute for butter, to wit, oleomargarine, under the name of and under the pretense that the same was butter, was fatally defective for failure to charge that the substance sold was made in the semblance of butter or in imitation thereof—the averment that accused sold oleomargarine not being tantamount to a charge that he sold "imitation butter," as defined by the statute. [REYNOLDS, P. J., dissents.]

6. ———: ———: "Oleomargarine." Oleomargarine cannot be held as a matter of law to be imitation butter or an article made in the semblance of butter. [REYNOLDS, P. J., dissents.]

7. INDICTMENTS AND INFORMATIONS: Sufficiency of Charge: Intendment. Every material fact necessary to constitute the offense must be alleged in the indictment or information, and nothing is to be taken by intendment or implication. [REYNOLDS, P. J., dissents.]

Appeal from St. Louis Court of Criminal Correction. —*Hon. Calvin M. Miller*, Judge.

REVERSED AND REMANDED.

CAUSE CERTIFIED TO SUPREME COURT.

Barclay, Fauntleroy, Cullen & Orthwein for appellant.

(1) The information is a mere copy of a statute which does not individuate the offense, and is insufficient under the following authorities: State v. Miner, 233 Mo. 312; State v. Burke, 151 Mo. 142; United States v. Cruickshank, 92 U. S. 542; State v. Meysenburg, 171 Mo. 25; State v. Krueger, 134 Mo. 262; State v. Watson, 206 Mo. 420; State v. Stowe, 132 Mo. 199;

Digitized by Google

State v. Fraker, 148 Mo. 143; State v. Barbee, 136 Mo. 440; State v. Pickett, 174 Mo. 668; State v. Cameron, 216 Mo. 420. (2) The information does not allege or specify what the pretense was. It is, therefore, not sufficiently definite to inform the accused of the nature and cause of the accusation against him as required by Constitution, art. 2, sec. 22. People v. Brady, 56 N. Y. 182; State v. Martin, 226 Mo. 538; State v. Pickett, 174 Mo. 663; State v. Fraker, 148 Mo. 143; State v. Levy, 119 Mo. 434; State v. Kain, 118 Mo. 5; State v. Chapel, 117 Mo. 639; State v. Fleming, 117 Mo. 377; State v. Cameron, 117 Mo. 371; State v. Benson, 110 Mo. 18; State v. Terry, 109 Mo. 601; State v. Clay, 100 Mo. 571. (3) In the information no person is named to whom the sale was made. State v. Miner, 233 Mo. 312; Robertson v. City, 38 N. J. Law, 72; People v. Burns, 6 N. Y. Supp. 611; Flannagan v. Plainfield, 44 N. J. Law, 119; State v. Burke, 151 Mo. 144; State v. Martin, 108 Mo. 117. (4) For aught that appears in the information, the defendant may have been in entire ignorance that the package was not butter. The information should allege that the defendant knew the article was imitation butter and pretense was false. *Scienter* is not alleged. Com. v. Boynton, 12 Cush. (Mass.) 500; State v. Roberts, 201 Mo. 722; State v. Bradley, 68 Mo. 140; State v. Phelon, 159 Mo. 127; State v. Delay, 93 Mo. 98; State v. Peacock, 31 Mo. 413; People v. Behee, 51 N. W. (Mich.) 515.

John P. Leahy for respondent.

(1) The information in this case follows the language of the statute in describing the offense, and is, therefore, sufficient. State v. Edgen, 181 Mo. 582. (2) It is well-settled law in this State that when an indictment or information describes the whole offense, as in the case at bar, and is in the language of the

Digitized by Google

statute, it is sufficient, and need not be made more specific. State v. DeWit, 152 Mo. 76; State v. Krueger, 134 Mo. 262; State v. Wilkerson, 107 Mo. 184. (3) It is not necessary that the quantity or price or the person to whom the oleomargarine was sold should be stated in the information, and the information was not demurrable in the absence of such averments. State v. Ladd, 15 Mo. 430; People v. Adams, 17 Wend. 475; State v. Pyscher, 179 Mo. 140. (4) Averment or proof of guilty knowledge by the defendant was not necessary to secure a conviction in this case—the act carried with it the intent. State v. Pyscher, 179 Mo. 140; State v. Speyer, 182 Mo. 77; State v. Lentz, 184 Mo. 223. (5) It is the act itself and not the intent that determines the guilt. Groff v. State, 171 Ind. 547.

ALLEN, J.—The defendant was convicted of selling a substance designed to be used as a substitute for butter, under the name of and under the pretense that the same was butter. His punishment was assessed at the fine of fifty dollars. After unsuccessful motions for a new trial and in arrest, he brings the case here by appeal.

The prosecution is based upon section 657, Revised Statutes 1909, which is as follows:

"*Offering imitation butter for sale.*—No person, by himself or another, shall sell or offer for sale any substance designed to be used for a substitute for butter under the name of or under the pretense that the same is butter."

Ths is a section of article IV, of chapter IV, Revised Statutes 1909, establishing a bureau of dairying, and relating to dairy products and imitations. The section in question is one of a number of sections of this article relating to imitation butter. Section 650 defines "imitation butter." Section 651 prohibits the coloring of imitation butter. Section 652 provides

Digitized by Google

how vessels containing imitation butter shall be marked. Section 653 provides that imitation butter shall be shipped under its true name. In other sections are found provisions concerning the mixing of oleomargarine with butter, the branding of "renovated" butter, etc.

Section 650, of this article, is as follows:

"*Imitation butter defined.*—For the purpose of sections 650 to 662 of this article, every article, substitute or compound, other than that produced from pure milk or cream from the same, made in the semblance of butter and designed to be used as a substitute for butter made from pure milk, or cream from the same, is hereby declared to be imitation butter."

The information charges: "That Thomas Shortell, in the city of St. Louis, on the third day of August, 1910, did, at No. 1209 North Thirteenth street, in the city of St. Louis, willfully and unlawfully sell and offer for sale a substance designed to be used as a substitute for butter, to-wit, oleomargarine, under the name of and under the pretense that the same was butter, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

I. It will be observed that the offense charged is set forth in the language of section 657, supra, and for this reason the respondent contends that it sufficiently advises the defendant of the nature and cause of the accusation. But it is a familiar rule of law, requiring no citation of authorities in its support, that where an indictment or information is based upon a statute creating an offense unknown to the common law, it must set forth and charge all of the constitutive facts required by the statute to constitute the offense and necessary to bring the accused fully within the statutory provisions.

Digitized by Google

The information, predicated solely upon section 657, is drawn upon the theory that this section may be taken separate and apart from the other provisions of the act, and that an information couched merely in the language of this section charges an offense under the statute. In other words it is insisted by respondent that it is not necessary to charge that the article sold was "imitation butter," or made in the semblance of butter, provided it is charged that it was designed to be used as a substitute for butter and sold under the pretense that it was the latter. But considering the act as a whole, and having in view particularly the relation of this section 657 to section 650, supra, it appears to be vital that the information charges that the thing sold was a substance made in imitation or in the semblance of butter. It was a well-known rule of statutory construction that a statute should not be construed as if it stood alone, as being complete in itself and unaffected by other statutes, but that all consistent statutes relating to the same subject are to be construed together, as constituting one act. [See Glaser v. Rothschild, 221 Mo. l. c. 212, 120 S. W. 1; State ex rel. v. Patterson, 207 Mo. l. c. 144, 105 S. W. 1048.] Here it is attempted to isolate one portion of an act from other sections thereof dealing with the same subject-matter, the latter being defined by one of these sections.

It is proper to consider the title to the act as an aid in construing its provisions. The title of this article is: "*Bureau of dairying, dairy products and imitations.*" The first section with which we are concerned is section 650 which defines "*imitation butter,*" "*for the purposes of sections 650 to 662.*" Then follow various sections pertaining to "*imitation butter,*" one of them being section 657, which purports to prohibit "*offering imitation butter for sale.*" Manifestly these two sections (650 and 657) must be read

Digitized by Google

together, and the latter construed with regard to the definition of the subject-matter thereof contained in the former section. It therefore becomes apparent that the legislative intent, in enacting section 657, was to prohibit the sale of *imitation butter,* i. e., a substitute or compound not produced from pure milk or cream, *made in the semblance of butter,* under the pretense that the same is butter.

Another well-established rule, to be borne in mind in this connection, is that criminal and penal statutes are strictly construed in favor of the defendant and against the State, both as to the charge and the proof. [State v. McMahon, 234 Mo. 611, 137 S. W. 872; State v. Koock, 202 Mo. 223, 100 S. W. 630.]

In the instant case the information merely charges a sale of "a substance designed to be used as a substitute for butter, to-wit, olemargarine." It is not charged that the substance in question was made in the semblance of butter, or in imitation of the latter, which, under the statute, is an essential element of the offense.

II. It is true that the information charges that the substance sold was oleomargarine, and it is urged, in effect, that this is tantamount to a charge that the defendant sold "imitation butter," or a substance made in the semblance of butter. But in order to sustain the information on this ground we should have to hold, as a matter of law, that oleomargarine is imitation butter, or an article made in the semblance of butter, and this, even though the oleomargarine be in its natural state, without artificial coloring or anything else to cause it to resemble butter. Both reason and authority are against our so doing.

Under a New York statute prohibiting the manufacture or sale of any article not produced from milk or cream, "in imitation or semblance of" butter, it has been held not criminal to sell a substitute for but-

Digitized by Google

ter unless it is in imitation or semblance thereof. [People v. Arensberg, 103 N. Y. 388, 57 Am. Rep. 741.] In that case the substance manufactured and sold was oleomargarine. The court said: "Whether the oleomargarine manufactured by the defendant was or was not an imitation or semblance of butter became the material inquiry, but was withheld from the jury, and they were instructed to convict upon proof of the manufacture and sale of the article known as oleomargarine. . . . The vital point of the alleged crime is the manufacture and sale of an article which is an imitation and semblance of butter, and so is calculated to deceive and indicates a deceptive purpose, immediate or ultimate, and that is a question of fact which the court was not authorized to determine as a matter of law, but upon the evidence produced should have submitted it to the jury." [See, also, People v. Meyer, 44 N. Y. App. Div. 1; People v. Wahle, 124 N. Y. App. Div. 762; People v. Simpson, 114 N. Y. Supp. 945; People v. Schnitzius, 113 N. Y. Supp. 313; State v. Meyer, 135 Wis. 86, 14 L. R. A. 1061; Bennett v. Carr, 134 Mich. 243, 96 N. W. 26.]

It is a familiar rule of criminal pleading that every material fact necessary to constitute the offense must be alleged in the indictment or information, and that nothing is to be taken by intendment or implication. [See State v. Hall, 130 Mo. App. l. c. 174, 108 S. W. 1077; State v. Timeus, 232 Mo. 177, 135 S. W. 26.]

We are here not dealing with the statute under consideration in State v. Addington, 12 Mo. App. 214, 77 Mo. 110, nor with the provisions of the present statute involved in State v. Bockstruck, 136 Mo. 335, 38 S. W. 317. In the latter case, however, the indictment charged, and the proof showed, that the oleomargarine sold was colored to imitate butter, in controvention of the provisions of the statute upon which the prosecution was there based.

Digitized by Google

The information is assailed upon other grounds and there are other assignments of error, but these matters will not be discussed because of the divergent views entertained by the members of this court concerning the questions involved in the case, and inasmuch as the cause is to be certified to the Supreme Court for final disposition.

The information being fatally defective, for the reasons given above, and insufficient to support a conviction, the judgment of the St. Louis Court of Criminal Correction should be reversed and the cause remanded. *Nortoni, J.*, concurs. *Reynolds, P. J.*, dissents in a separate opinion, and as he deems the decision rendered herein to be contrary to that of the Supreme Court in State v. Bockstruck, 136 Mo. 335, 38 S. W. 317; and in State v. Hilton, 248 Mo. 522, 154 S. W. 729, and to other decisions cited in his dissenting opinion, he asks that the cause be certified to the Supreme Court, which is accordingly done.

DISSENTING OPINION.

REYNOLDS, P. J.—I find myself unable to agree to the conclusions arrived at by my esteemed Brother Allen as to the sufficiency of the information in this case. I have expressed my view of a similar information in the case of State v. Maurer, *post*, p. 175, to which I refer, and think all the points of objection which are raised by my Brother ALLEN to the present information are disposed of contrary to his contention by the ruling of our Supreme Court in State v. Bockstruck, 136 Mo. 335, 38 S. W. 317, in which an information under this same oleomargarine law, although a different section of it, was before the Supreme Court and was held to be sufficient. I am very clearly of the opinion that when this information charges, as it does, that the defendant sold oleomargarine as and for butter, that

Digitized by Google

it is sufficient to bring the offense within the statute. See also State v. Wilkerson, 170 Mo. 184, l. c. 191 and 193, 70 S. W. 478, and State v. Edgen, 181 Mo. 582, l. c. 589, 80 S. W. 942, as to the sufficiency of the information in other respects, that is, it charges a statutory offense substantially in the language of the statute. I ask that this case be certified to the Supreme Court as directly in conflict with that case, which I consider the last controlling decision of the Supreme Court on the subject, as also contrary to the decisions of our Supreme Court in State v. Cummings, 248 Mo. 509, 154 S. W. 725, and State v. Hilton, 248 Mo. 522, 154 S. W. 729, as well as to the other cases referred to on this point in my dissenting opinion in State v. Maurer and in this opinion.

STATE OF MISSOURI, Respondent, v. JACOB MAURER, Appellant.

St. Louis Court of Appeals, May 6, 1913.

FOOD: Sale of Imitation Butter: Sufficiency of Information. An information charging that defendant unlawfully sold and offered for sale a substance designed to be used as a substitute for butter, to-wit, oleomargarine, was fatally defective for failure to charge that the substance was "imitation butter or made in the semblance of butter;" following State v. Shortell, ante. *Held*, by **REYNOLDS, P. J.**, dissenting, that inasmuch as oleomargarine is an article "other than that produced from pure milk or cream from the same, made in sumblance of butter and designed to be used as a substitute for butter made from pure milk or cream from the same," it is "imitation butter," under Sec. 650, R. S. 1909, and hence the charge in the information that oleomargarine was sold "under the name and under the pretense that the same was butter," was sufficient to bring the offense within the statute.

Appeal from St. Louis Court of Criminal Correction. —*Hon. Benj. Klene*, Judge.

Digitized by Google

REVERSED AND REMANDED.

CAUSE CERTIFIED TO SUPREME COURT.

Zachritz & Zachritz for appellant.

The information charges no violation of law. In order to charge the offense under section 4835 the information should have alleged a sale, or offer of sale, of the imitation substitute for butter without packing the same in firkins, tubs or paper packages with the true name of said imitation substitute clearly and indelibly branded, marked or labeled thereon. It is fundamental that an indictment or information predicated upon the provisions of a statute must charge the offense in the language of the statute, and the allegation must be sufficient to fully inform the defendant of the nature and character of the offense he is called upon to answer on his trial. State v. Watson, 216 Mo. 420; State v. Gibbs, 129 Mo. App. 700; State v. Haney, 130 Mo. 95; State v. Lentz, 184 Mo. 223.

Elliott W. Major, Attorney-General, and *Campbell Cummings,* Assistant Attorney-General, and *John P. Leahy* for respondent.

ALLEN, J.—Defendant was convicted of selling a substance designed to be used as a substitute for butter, under the name of and under the pretense that the same was butter. The information charges that the defendant "in the city of St. Louis, on the 15th day of October, 1909, did, by a clerk, at No. 8 South Jefferson avenue, in said city, unlawfully sell and offer for sale a substance designed to be used as a substitute for butter, to-wit, oleomargarine," etc.

The prosecution is based upon section 657, Revised Statutes 1909, and the information does not

Digitized by Google

charge that the substance which it is alleged the defendant sold or offered to sell was "imitation butter," or made in the semblance of butter. In State v. Shortell, just decided, it was held by a majority of this court that an information in this form failed to charge an offense under the statute, and was insufficient to support a conviction. For the reasons there given the information here must be held to be fatally defective.

It is unnecessary to touch upon the other questions involved in the case. The judgment of the St. Louis Court of Criminal Correction should be reversed and the cause remanded. *Nortoni, J.*, concurs. *Reynolds, P. J.*, dissents in a separate opinion, and as he deems the decision rendered herein to be contrary to that of the Supreme Court in State v. Bockstruck, 136 Mo. 335, 38 S. W. 317, and in State v. Hilton, 248 Mo. 522, 154 S. W. 729, and to other decisions cited in his dissenting opinion, he asks that the cause be certified to the Supreme Court, which is accordingly done.

DISSENTING OPINION.

REYNOLDS, P. J.—The assistant prosecuting attorney of the city of St. Louis, on the 22nd of October, 1909, filed an information in the court of criminal correction of that city, against the defendant, appellant here, in which it is charged that the defendant, in the city of St. Louis and on the 15th of October, 1909, "did, by a clerk, at No. 8 South Jefferson avenue in the city of St. Louis and State of Missouri, unlawfully sell and offer for sale, a substance designed to be used as a substitute for butter, to-wit, oleomargarine, under the name and under the pretense that the same was butter, contrary to the form of the statute," etc.

Digitized by Google

On trial before the court and a jury there was evidence on the part of the State tending to show that two or more witnesses called at the place of business of defendant mentioned in the information, that defendant himself was absent and had been absent from that place all that day; that they asked the clerk in charge for a pound of creamery butter and the clerk asked, "What price?" The witness said, "Twenty-five cents," and the clerk took a substance from a firkin, weighed it and handed it to the witness, who paid twenty-five cents for it. The article so sold and delivered in obedience to this request for a pound of creamery butter appeared, on analysis, to be oleomargarine and not butter. Over the firkin from which it was taken was a sign, "Wisconsin Creamery, 25 cents." Defendant undertook to show that "Wisconsin Creamery," was a name understood by the trade and people generally to be a name for oleomargarine. On objection of the State this was excluded.

Defendant, testifying as a witness in his own behalf, stated, substantially, that he had eight stores, including the one in question; that he employed sixty or seventy clerks and salesmen, a number being employed in the store in question; that he was a licensed dealer in oleomargarine at that place, and had instructed his clerks, including the one mentioned as making the sale, not to sell oleomargarine as or for butter and to have all their papers stamped "oleomargarine," and to sell oleomargarine for what it was; that as to the sale in question he was not present and had no knowledge of it and had never sanctioned it. Defendant further testified that his oleomargarine firkins or tubs were labeled "oleomargarine," and that was on the government stamp on the side of the tub from whch the substance was taken.

Digitized by Google

At the close of plaintiff's testimony and again at the close of all the testimony, defendant interposed demurrers which were overruled.

At the close of the case defendant asked several instructions, all of which the court refused, plaintiff excepting.

One of these instructions was to the effect that if the clerk, whom it is alleged made this sale of the alleged substitute for butter, at the time he delivered it to the purchaser, placed upon the package in which it was contained or upon the wrapper thereof the word "oleomargarine," then defendant cannot be held to have sold the substance under the name of butter or under the pretense that it was butter.

The court of its own motion instructed the jury to the effect that if they found that defendant, by a clerk, at the time and place specified, sold a substance designed to be used as a substitute for butter, to-wit, oleomargarine, under the name of and under the pretense that it was butter, they should find defendant guilty as charged in the information; but if they did not so find, they should acquit defendant, also instructing the jury as to the punishment in case of a conviction.

The court further instructed the jury that if they believed from the evidence that the sale of a substance designed to be used as a substitute for butter "was made by a person in the employ of the defendant, and it has been proven to your satisfaction and beyond a reasonable doubt that such sale of said substitute was made by said employee, under the name of and under the pretense that the same was butter, such act would be the act of the defendant, unless you further find that such sale was made contrary to the orders of defendant; proof of this is upon the defendant, and if he shows this to be a fact you should acquit him."

Instructing the jury, in substance—and we here condense—that the information filed was no proof of

Digitized by Google

the charge; that the law presumes the defendant to be innocent and that that presumption continues until it has been overcome by evidence establishing his guilt to the satisfaction of the jury beyond a reasonable doubt; that the burthen of proving his guilt rests upon the State; that if they have a reasonable doubt they should acquit; properly defining "a reasonable doubt;" and that the previous good character of the defendant, if proved by the evidence, is a fact in the case which they should consider in passing upon his guilt or innocence, the law presuming that one whose character is good is less likely to commit a crime than one whose character is not good, the court instructed the jury, "but if all of the evidence, including that which has been given touching the previous good character of the defendant shows him to be guilty, then his previous good character cannot justify, excuse, palliate or mitigate the offense."

The court further instructed as to the credibility of the witnesses and that if the jury believed that any witness had knowingly sworn falsely to any material fact they were at liberty to reject all or any portion of that witness's testimony.

The jury returned a verdict against defendant, assessing his punishment at a fine of fifty dollars. Judgment followed accordingly and from this, defendant, interposing a motion for new trial as well as one in arrest, perfected his appeal to the Supreme Court.

The appeal was taken to the Supreme Court by defendant, on the ground that in the motion in arrest he had attacked the constitutionality of sections 4749, 4750 and 4751, Revised Statutes 1899.

On motion of the Attorney-General, the Supreme Court transferred the cause to this court, holding that the constitutional question had not been raised in due time and in proper manner in the trial court.

Digitized by Google

It will be noted that the prosecution was commenced before the Revised Statutes of 1909 took effect. [See section 8094, Revised Statutes 1909.] But section 4749, Revised Statutes 1899, on which the information is founded, now appears in the Revision of 1909 as section 657.

The points made in argument before us by the learned counsel for the appellant are, that the information charges no violation of law; that the court should have sustained defendant's demurrer at the close of the State's case; that the evidence, including defendant's testimony, all shows that defendant was not present on the day of the sale; had no knowledge of what transpired; that the firkins containing oleomargarine were labeled as such; that he had a government license to sell oleomargarine; that he had not given consent to the sale by the clerk; on the contrary had instructed all of his clerks, including the one who made this sale, to sell oleomargarine for oleomargarine and butter for butter; that the court should have sustained the demurrer at the close of the whole case; that it erred in refusing the instructions tendered and in giving instructions of its own motion and that it should have sustained the motions for new trial and in arrest.

Learned counsel for appellant seem to have fallen into an error as to the section of the statute here involved. They state that the prosecution is founded on a violation of section 2276, Revised Statutes 1899, now section 4835, Revised Statutes 1909. The information is not founded on that section but on what was section 4749, Revised Statutes 1899, now section 657, which provides: "No person by himself or another, shall sell or offer for sale any substance designed to be used for a substitute for butter under the name of, or under the pretense that the same is, butter." The information, as will be observed, follows this section of the statute almost word for word,

Digitized by Google

save that when the law denounces the selling or offering for sale of "any substance designed to be used for a substitute for butter, under the name of, or under the pretense that the same is, butter," the information charges the sale and offer for sale of "a substance designed to be used as a substitute for butter, to-wit, oleomargarine, under the name and under the pretense that the same was butter."

Section 4744, Revised Statutes 1899, now section 650, Revised Statutes 1909, provides that "every article, substitute or compound, other than that produced from pure milk, or cream from the same, made in the semblance of butter and designed to be used as a substitute for butter made from pure milk, or cream from the same, is hereby declared to be imitation butter," and it is declared in that section that "imitation butter," as the words are used in the following sections, including section 657, shall be so construed. If the pleader, in drawing up this information had used the words "imitation butter" in the information, so as to have charged that defendant did "unlawfully sell or offer for sale, a substance designed to be used for a substitute for butter, to-wit, *imitation butter,* under the name and under the pretense that the same was butter," there could be no doubt that an offense would be charged. Instead of using the words "imitation butter," the pleader used the word "oleomargarine." Can there be any doubt that this word "oleomargarine" as here used, followed with the words that it was sold as butter, charges a sale of imitation butter? We think not. Webster's New International Dictionary (1910) defines oleomargarine to be a mixture of oleo-oil with neutral lard. The Standard Dictionary defines it to be "artificial butter; . . . the name by which the United States government recognizes the product under the name of oleomargarine." The Century Dictionary defines oleomargarine to be, "a granular solid fat of a slightly

Digitized by Google

yellowish color, obtained from the leaf-fat or caul- of cattle." Evidently, then, oleomargarine is an ar ticle "other than that produced from pure milk, cream from the same, made in the semblance of butt and designed to be used as a substitute for butter ma from pure milk or cream from the same," and wh it is charged that it was sold "under the name and under the pretense that the same was butter," it is sufficient to bring the offense within the statute. The chemist who testified in this case said that the substance identified as purchased at defendant's place of business had been analyzed by him and he found it to be oleomargarine and not butter. But it is hardly necessary to resort to lexicographers for definitions of this word. The common understanding is that it is imitation butter. Judge BROWN, in State v. Cummings, 248 Mo. 509, 154 S. W. 725, has very distinctly held that the courts are presumed to judicially know facts which are well known to all the people. It seems to me very clear that when an information charges, as this one does, that the defendant sold oleomargarine under the pretense that it was butter, he is distinctly charged with the offense designated by the statute and so clearly that he could not possibly be in any doubt as to the charge he was to meet. That is all that is required. When one asks for butter and oleomargarine is sold and delivered to him, the statute has been violated. This information distinctly so charges and it will not do for the defendant to say that he did not understand with what offense he stood charged. To do him and his counsel justice, it is fair to say that they make no such claim; in point of fact, the defense is that the defendant sold oleomargarine, as he himself testifies, as oleomargarine and butter as butter, and had instructed his clerks so to do.

Comparing this information with that which was approved in State v. Bockstruck, 136 Mo. 335, 38 S. W. 317, and construing oleomargarine to mean imitation

Digitized by Google

butter, as defined by section 650, I find no substantial difference between the two informations, and think that the information before us is good. I think that it is further sustained as to form by the decision of our Supreme Court in State v. Wilkerson, 170 Mo. 184, l. c. 191 and 193, 70 S. W. 478, in State v. Edgen, 181 Mo. 582, l. c. 589, 80 S. W. 942, and in State v. Hilton, 248 Mo. 522, 154 S. W. 729.

I have set out the substance of the testimony introduced on the part of the State, and think it was sufficient to warrant submission of the case to the jury. Hence I think there was no error in refusing to sustain the demurrer offered at the close of the testimony for the State.

While it is true that defendant was not present at the time of this sale, it is in evidence that the sale was made by a clerk in his employ and on the premises of defendant. The statute reaches sales by the merchant or by "another." The liability of the defendant for the act of his clerk, under the provisons of a like section of the statute, is established by our Supreme Court in State v. Bockstruck, supra. There Judge SHERWOOD, who delivered the opinion, says (l. c. 350): "The evidence already detailed was sufficient to authorize a conviction of defendant under the charge contained in the information; and the fact that the sale in question was made by a young clerk of defendant, made out against defendant a prima facie case, inasmuch as the sale occurred in defendant's store, in apparently the ordinary course of business. [State v. McCance, 110 Mo. 398.] If the sale was made against the order of the owner, this was matter of defense. [*Ibid.*; State v. Baker, 71 Mo. 475.]"

It will be noticed by the brief summary I have made of the instructions given by the court of its own motion, that the case was submitted to the jury in entire harmony with this decision of our Supreme Court.

Digitized by Google

This also disposes of the proposition that the court should have sustained a demurrer at the close of the whole case. The jury had before it the testimony of the witnesses for the plaintiff, showing the sale and the manner in which it was made; it had before it the testimony of the defendant as to his mode of conducting business and his instructions to his clerks and as to his marking of firkins containing substances other than butter as oleomargarine and it then became a question of fact for the determination of the jury as to which version they would accept, whether the testimony of the defendant, in connection with that given for the State, made out a defense. The jury, under proper instructions as to this very point, found otherwise. That verdict should be conclusive upon us. This disposes of the points as to error of the court in giving instructions.

The instructions asked by defendant were properly refused, either as not the law or because the propositions there asked were covered by the instructions given by the court of its own motion. One instruction, however, asked by defendant and of which we have given the substance, was not covered by the instructions given by the court of its own motion, and properly so, because there was no evidence in the case warranting it. For this reason it was properly refused.

I think the motions for new trial and in arrest were properly overruled.

Finding no reversible error in the cause the judgment of the court of criminal correction should be affirmed.

The foregoing, in the main, with slight changes in verbiage, was prepared as the opinion of the court. On submission of it and of the one prepared in State v. Surkamp, my brethren refused to follow my holding as to the sufficiency of the informations, the views of the majority being set out in an opinion

Digitized by Google

by my Brother ALLEN in State v. Shortell. I am unwilling to agree to this view and think the decisions of our Supreme Court in State v. Bockstruck, supra, and State v. Hilton, supra, as well as the other cases I have cited on this point, are directly contrary to the holding of my brethren here. In State v. Hilton, supra, Judge WALKER has said, passing on an information which was founded on a statutory offense—not on a common law one, "A familiar rule of criminal pleading is that, where a statute specifically defines an offense, an indictment or information thereunder is sufficient which properly follows the language of the statute."

It is admitted by my learned Brother ALLEN that these informations do follow the language of the particular section of the statute but fail to state facts required by the statute as a whole to constitute the offense, and he argues that these informations fail in this respect; that they follow the words of the particular section, disregarding the caption, and—not doing that—he holds them fatally defective. That is where I think the decision of our court in that case is wrong. To go into a description of the offense with too much particularity is sometimes as fatal as to be too brief. [See State v. Cummings, supra.]

In this present case there can be no pretense that the defendant was not advised of the offense with which he stood charged, to which, in brief, his defense was that he had not sold as and for butter, an imitation article, namely oleomargarine.

I therefore ask that this cause be certified and transferred to the Supreme Court.

Digitized by Google

STATE OF MISSOURI, Respondent, v. BENJAMIN SURKAMP, Appellant.

St. Louis Court of Appeals, May 6, 1913.

FOOD: Sale of Imitation Butter: Sufficiency of Information. An information charging that defendant unlawfully sold and offered for sale a substance designed to be used as a substitute for butter, to-wit, oleomargarine, was fatally defective for failure to charge that the substance was "imitation butter or made in the semblance of butter;" following State v. Shortell, ante. [REYNOLDS, P. J., dissents.]

Appeal from St. Louis Court of Criminal Correction. —*Hon. Benj. Klene,* Judge.

REVERSED AND REMANDED.

CAUSE CERTIFIED TO SUPREME COURT.

Zachritz & Zachritz for appellant.

John P. Leahy for respondent.

ALLEN, J.—The information in this case charges that the defendant, "on the 8th day of October, 1909, did, by a clerk, at stand No. 63 Union Market, in the city of St. Louis and State of Missouri, unlawfully sell and offer for sale a substance designed to be used as a substitute for butter, to-wit, oleomargarine," etc.

The prosecution is based upon the same statute which we had under consideration in State v. Shortell, just decided, and here, as there, the information fails to charge that the substance which it is alleged the defendant sold or offered to sell was "imitation butter," or made in the semblance of butter. For the reasons given in the Shortell case this information must be held insufficient to support a conviction.

Digitized by Google

Other questions involved need not be discussed. The judgment of the St. Louis Court of Criminal Correction should be reversed and the cause remanded. *Nortoni, J.,* concurs. *Reynolds, P. J.,* dissents in a separate opinion, and as he deems the decision rendered herein to be contrary to that of the Supreme Court in State v. Bockstruck, 136 Mo. 335, 38 S. W. 317, and in State v. Hilton, 248 Mo. 522, 154 S. W. 729, and to other decisions cited in his dissenting opinion, he asks that the cause be certified to the Supreme Court, which is accordingly done.

DISSENTING OPINION.

REYNOLDS, P. J.—This case, both as to the information and its facts, presents no substantial points not covered by the opinon I wrote in State v. Maurer, *ante,* p. 164. The information is based upon the same section of the statutes, that is, what is now section 657, Revised Statutes 1909; the testimony is practically along the same lines, the instructions and action of the court in giving and refusing them practically follow the same line. Counsel make practically the same points for reversal and cite the very same authorities here as there.

I think that the judgment of the St. Louis Court of Criminal Correction in this case should be affirmed.

As my brethren do not agree to this and hold, on the authority of the opinion filed in State v. Shortell, *ante,* p. 153, that the information here is fatally defective, they order that the judgment be reversed and the cause remanded. As I think this is contrary to the decisions of our Supreme Court in State v. Bockstruck, 136 Mo. 335, 38 S. W. 317, and State v. Hilton, 248 Mo. 522, 154 S. W. 729, and to other decisions cited by me in my dissenting opinion in State v. Maurer, supra, and referring

Digitized by Google

to my dissenting opinion in that case for my reasons, I ask that this cause and the papers therein be certified to the Supreme Court.

GILSONITE CONSTRUCTION COMPANY, Respondent, v. ROSALIE GREFFET, Appellant.

St. Louis Court of Appeals, May 6, 1913.

1. **STATUTES: Construction: Retrospective Operation.** Statutes should be construed as prospective in intention and application, unless their language clearly calls for retrospective operation.

2. ———: ———: ———. Even remedial statutes are not allowed a retrospective operation when they create an additional disability or otherwise impair vested rights.

3. **SPECIAL TAX BILLS: Notice of Suit: Requirements: Statutes: Construction.** Sec. 9848, R. S. 1909, provides that, whenever any suit shall be commenced to enforce the lien of a special taxbill in cities having over 300,000 population, the plaintiff, within ten days after commencing it, shall file with the city comptroller a written notice stating when and in what court the suit has been brought. Section 9849 provides that such liens shall cease in two years after the taxbill shall have become due and payable, unless suit shall have been brought thereon and notice given and filed within that time as required by section 9848. *Held*, that, although these statutes affect the remedy merely, yet as the two-year period prescribed, after which the lien is to terminate, is not a mere statute of repose but a limit to the existence of the lien, the requirement of notice creates an additional burden on the plaintiff and a failure to comply therewith constitutes a new defense available to the defendant, in actions on taxbills, and hence the statute should not be given a retroactive effect so as to apply to taxbills issued prior to its adoption.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow,* Judge.

AFFIRMED.

Digitized by Google

Kinealy & Kinealy for appellant.

(1) The requirement of section 9848 of the Revised Statutes as to filing notice of suit with the city comptroller is mandatory and therefore the court erred in giving plaintiff's first instruction and in refusing defendant's first two instructions. 36 Cyc. 1157, title Statutes; Hope v. Flentge, 140 Mo. 401; Horsfall v. School District, 143 Mo. App. 541. (2) This statute effects the remedy merely and therefore it applies to this case and the court erred in giving plaintiff's second instruction. Clark v. Railroad, 219 Mo. 524; Gibson v. Railroad, 225 Mo. 473; St. Louis v. Calhoun, 222 Mo. 44; Daggs v. Insurance Co., 136 Mo. 382; O'Bryan v. Allen, 108 Mo. 227; Zellars v. Surety Co., 210 Mo. 86.

Edward C. Kehr for respondent.

The Act of June 1, 1909, imposes an additional burden on the holder of a special tax bill, namely, the obligation to file a notice with the comptroller; but remedial laws are not allowed a retrospective operation when they create an additional disability or new defense or otherwise impair vested rights. Petring v. Rand & C. Co., 111 Mo. App. 377; Manwaring v. Mo. L. & M. Co., 200 Mo. 733.

NORTONI, J.—This is a suit on five separate special tax bills declared upon in as many separate counts of the petition. Plaintiff recovered and defendant prosecutes the appeal.

The special tax bills were issued to plaintiff against five separate lots owned by defendant on account of the construction of a sidewalk in front of such lots in the city of St. Louis. The tax bills were issued December 17, 1907, under the provisions of the charter of the city of St. Louis, which prescribed the lien

Digitized by Google

of the tax bills should expire if not sued upon within two years from their date. Notice of the issuance of the tax bills and demand was duly made on the defendant owner of the property. After the tax bills were issued and after the notice thereof was served and demand made on the defendant, the Legislature contributed the following two sections to our statutory law:

"Whenever any suit shall be commenced in any city of this State now having, or which may hereafter have a population of three hundred thousand or more inhabitants, on any special tax bill to enforce the payment or the lien thereof, the party or parties plaintiff shall, within ten days after the commencement of such suit, file with the comptroller or other officer of such city, in whose office the record of such special tax bills is required to be kept, a written notice setting forth when and in which court such suit was brought; and the comptroller or such other officer shall immediately note such facts on the record of such tax bill." [Sec. 9848, R. S. 1909.]

"The lien of every such tax bill shall cease, end and determine in two years after said tax bill, or the last installment thereof, if the same be payable in installments, shall have become due and payable, unless suit shall have been brought on such tax bill, and notice of such suit, as hereinbefore required, shall have been given and filed within that time. If within said time no such suit was brought, or if within said time no such notice of suit shall have been filed, the tax bill shall be presumed to have been paid, and the comptroller, or other proper officer, shall make an appropriate entry on the record of the tax bill in his office that the lien thereof has expired by lapse of time." [Sec. 9849, R. S. 1909.]

This suit was instituted on the several tax bills, December 16, 1909, or one day before the expiration of the limitation period prescribed in the city charter

Digitized by Google

with respect to the lien. Though plaintiff instituted the suit within the time limit prescribed to preserve the lien, it omitted to file the notice thereof with the comptroller of the city of St. Louis in accordance with the statutes above copied. By the answer defendant pleads this fact and defends on the ground alone that the notice of the filing of the suit required by sections 9848 and 9849, Revised Statutes 1909, was not filed with the comptroller within the time prescribed therein. The court gave judgment for plaintiff on the tax bills and a special judgment against the properties enforcing their liens as though the statutes above copied are unavailing in defense of the instant suit.

It is argued here these statutes go to the remedy only and that it is therefore competent for the Legislature to enact them and impose an additional burden upon the plaintiff, even though the enactment was subsequent to the date the tax bills were issued and the notice thereof and demand on defendant owner. But we are not so persuaded. It is to be noted that section 9848 is merely directory, in so far as it requires a plaintff in a suit on the bill to file with the comptroller, within ten days after the commencement of the suit, a written notice setting forth the fact of the suit and the court in which it is instituted, which facts the comptroller must immediately note in the proper record. The succeeding section (9849) prescribes the same period of time in which the lien of the tax bills here involved would expire, for they were not payable in installments. Such period would expire two years after the issuance of the tax bills to plaintiff. But by the provisions of this section the lien of the tax bills would "cease, end and determine" at the expiration of the two-year period, "unless suit shall have been brought on such tax bill, and notice of such suit, as hereinbefore required, shall have been given and filed within that time. It appears from this requirement of the statute that an additional burden is cast upon

Digitized by Google

plaintiff, the holder of the tax bill, which was outstanding at the time the statute was enacted, requiring him to file the notice with the comptroller, in addition to instituting the suit on the tax bill during the two-year period. By the subsequent provision of the same section, the statute declares that if the suit is not brought and the notice filed within the prescribed time, the tax bill shall be presumed to have been paid and the lien thereof to have expired by lapse of time.

Though it be that these statutes affect the remedy merely, the two-year period prescribed in the charter, after which the lien is to terminate, is regarded, not as a mere statute of repose to bar actions, but rather as a limit to the existence of the lien, and, therefore, unless suit is instituted and, according to the new statute above quoted (Sec. 9849), notice of the suit filed with the comptroller within that time, such lien expires and may not be revived and enforced against the interests of the owner of the land. [Smith v. Barrett, 41 Mo. App. 460; Granite Bituminous Pav. Co. v. Parkview R. Co., 168 Mo. App. 468, 151 S. W. 479, 484.] Obviously the requirement of the statute to file the notice of suit with the comptroller within that time imposed an additional burden upon plaintiff and purports to create a new defense available to defendant.

It is the established rule for the interpretation of legislative acts that they shall be construed as prospective in intention and application and not retrospective, unless their language clearly calls for retroactive operation. [See State ex rel. v. Dirckx, 211 Mo. 568, 577, 111 S. W. 1; Petring v. Current River Land & Cattle Co., 111 Mo. App. 373, 376, 85 S. W. 933.] We find nothing in the words or the manifest intention of the two sections of the statute copied which clearly signify that it was contemplated they should have a retroactive effect upon tax bills then issued and outstanding or be utilized to defeat the liens

Digitized by Google

of such bills which would expire at the termination of two years from their issue. Moreover, even remedial laws are not allowed a retrospective operation when they create an additional disability or new defense or otherwise impair vested rights. [Petring v. Current River Land & Cattle Co., 111 Mo. App. 373, 377, 85 S. W. 933.] It may be that plaintiff is without a vested right in the limitation period prescribed by the charter, but be that as it may, it is clear that the statutes above set out, when considered together, if applicable at all, impose an additional burden upon him and create an additional defense against his lien. This may not be allowed even as within the purview of remedial legislation. The statutes should be regarded as ineffective in so far as the tax bills in suit are concerned. The judgment should, therefore, be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

STATE OF MISSOURI, Respondent, v. JAMES MILES, JR., Appellant.

St. Louis Court of Appeals, May 6, 1913.

1. **APPELLATE PRACTICE: Crimes and Punishments: Duty of Court to Examine Record.** On appeal by the defendant from a judgment of conviction in a prosecution for a criminal offense, although neither appellant nor respondent files briefs, it is the statutory duty of the court to examine the record for error, under Sec. 5312, R. S. 1909.

2. **LARCENY: Petit Larceny: Sufficiency of Information.** An information, in a prosecution for petit larceny, charging that defendant, on a certain day and in a certain place, unlawfully and willfully stole, took and carried away, of the money and property of a person named, $1.08, lawful money of the United States, of the value of $1.08, was sufficient.

3. **CRIMES AND PUNISHMENTS: Alibi: Instructions.** An instruction, covering the defense of alibi, in a criminal prose-

Digitized by Google

cution, that if the evidence left a reasonable doubt as to defendant's presence at the place where the offense was committed at the time of its commission, he could not be convicted, for the presumption of innocence attends him throughout the trial and he can only be convicted on the establishment of guilt beyond a reasonable doubt, was correct.

Appeal from St. Louis Court of Criminal Correction. —*Hon. Wilson A. Taylor,* Judge.

AFFIRMED.

Zachritz & Zachritz for appellant.

Philip W. Moss for respondent.

NORTONI, J.—Defendant was convicted on a charge of petit larceny and prosecutes this appeal from that judgment. After hearing the evidence and instructions, the jury found defendant guilty, and fixed his punishment at a fine of one dollar.

Neither appellant nor respondent has filed briefs in the case, but, notwithstanding, we have examined the record for error, as is our duty under the statute.

The information filed by the assistant prosecuting attorney charges that defendant, on the 26th day of June, 1909, in the city of St. Louis, Missouri, did unlawfully and willfully steal, take and carry away, of the money and property of Mrs. Fannie Horowitz, $1.08, lawful money of the United States, of the value of $1.08. The information in all respects is sufficient and in the usual and approved form in cases of petit larceny.

The evidence tends to prove that Mrs. Horowitz owns a little store in St. Louis, and that while she was in a rear room attending to the wants of her children, who reside with her there, defendant entered the front door of the store and took $1.08 from her cash register. She entered the store as defendant was in the

Digitized by Google

act of perpetrating the theft and witnessed the taking of the money. The evidence for the State, besides being pointed and direct in its tendency to prove the crime charged, is abundant to that effect. Defendant pleaded not guilty, denied the charge and sought to establish an alibi by the evidence of himself and a friend. The case was submitted to the jury under proper instructions and a verdict of guilty returned thereunder.

The instructions informed the jury, among other things, that defendant was presumed to be innocent of the crime charged against him and that the burden of proving it rested upon the State and that defendant's guilt must be established beyond a reasonable doubt before a conviction could be had; that if the jurors entertained a reasonable doubt as to his guilt, the verdict should be for him. The usual instruction to the effect that defendant was a competent witness in his own behalf was also given in the approved form. Touching the matter of the alibi interposed in defense, the court instructed the jury that if the evidence left a reasonable doubt as to defendant's presence at the place where the offense was committed at the time of the commission thereof, he should be found not guilty, for the presumption of innocence attended him throughout the trial and he could be convicted only on his guilt being established beyond a reasonable doubt. Obviously no error appears in this instruction. Indeed, each and all of the instructions have been approved in like cases time and again.

There appears to be no reversible error in the record and the judgment should therefore be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

Digitized by Google

AMERICAN SILVER MANUFACTURING COMPANY, Respondent, v. WABASH RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, May 6, 1913.

1. **COMMON CARRIERS: Interstate Commerce: Supremacy of Federal Laws.** The extent of a carrier's liability for loss of an interstate shipment of goods is governed by the Interstate Commerce Act of February 4, 1887, 24 Stat. at Large, 379 (U. S. Comp. St. 1901, p. 3154), and its amendments, including that of June 29, 1906, 34 Stat. at Large, 584 (U. S. Comp. St. Supp. 1911, p. 1284), and the decisions of the United States Supreme Court construing these acts, which supersede all State regulations and rules of decision on the subject.

2. **CONTRACTS: Written Contract: Prior Negotiations.** All prior negotiations and conversations antecedent to the execution of a contract are deemed to have been merged in it, and, in an action on it, the recovery must be in accordance with its terms, in so far as they are valid.

3. **COMMON CARRIERS: Interstate Commerce: Limitation of Carrier's Liability.** Where a common carrier publishes and files, in accordance with the Interstate Commerce Act, two rates on interstate shipments, under the lower of which the carrier's liability for loss is limited to ten times the freight paid, and under the higher of which the carrier's liability is unlimited, a shipper whose goods are shipped under the lower rate may recover, in the event of loss, only in accordance with the limitation annexed to such rate; such limitation being valid under the Interstate Commerce Act and its amendments as construed by the Supreme Court of the United States.

4. ———: ———: ———. Where the bill of lading issued by a carrier for an interstate shipment provided that the amount of any loss should be computed on a basis of the value of the property at the time of shipment, unless a lower value was represented in writing by the shipper, or was agreed on, or was determined by the classifications or tariffs on which the rate was based, in any of which events the lower value should be the maximum amount to govern such computation, and the shipment was made under a rate, published and filed in accordance with the Interstate Commerce Act, which limited the carrier's liability, in case of loss, to ten times the freight paid, the shipper, in an action on the contract for loss

Digitized by Google

of the shipment, was bound by the contract as written, and a recovery could be had only in the amount of ten times the freight paid, notwithstanding the fact that the shipper disclosed to the carrier's agent that the value of the goods was several thousand dollars, and the carrier, and not the shipper, selected the rate charged, when another and higher rate was in force, under which the carrier would have assumed full liability for loss.

5. **INTERSTATE COMMERCE: Rates not Subject of Contract.** Interstate commerce rates, when duly filed and approved, are fixed by law and, therefore, not the subject of contract between the parties.

6. **———: Presumption of Reasonableness of Rates.** The question of the reasonableness or unreasonableness of rates established in accordance with the Interstate Commerce Act, and the conditions attached to them, is not one for the courts to determine in the first instance, but primarily is committed to the Interstate Commerce Commission, and, therefore, it is the duty of the courts to treat with such rates and annexed conditions as being reasonable and just, whatever may be their views on the subject.

Appeal from St. Louis City Circuit Court.—*Hon. Moses N. Sale,* Judge.

REVERSED AND REMANDED (*with directions*).

James L. Minnis, N. S. Brown and *Bates, Blodgett, Williams & Davis* for appellant.

(1) We assert that where the plaintiff not only declares upon a special contract with a carrier, but further offers the contract in evidence and expressly during the trial disclaims any intention to depart from or vary its terms, he thereby affirms its validity and must abide by its terms. Railroad v. Paramore, 119 Ga. 690; Wetsell v. Dinsmore, 4 Daly (N. Y.), 195; Inman v. Seaboard Airline, 159 Fed. 960; Chlanda v. Transit Co., 214 Mo. 260; Fox v. Windes, 127 Mo. 512. (2) A shipment by rail from the city of St. Louis, Missouri, to the city of Peoria, Illinois, is an interstate commerce shipment and controlled by the inter-

Digitized by Google

state commerce acts of Congress, so far as their provisions are applicable. These acts are found in 3 U. S. Compiled Statutes, pages 3153, et seq., and 1911 Supplement thereto, pages 1284, et seq. (a) Both railroads and shippers in interstate shipments are bound by the established rates, any contract to the contrary notwithstanding. Railroad v. Abilene, etc., Co., 204 U. S. 426, 445; Railroad v. Oil Mills, 204 U. S. 449, 451; Railroad v. Albert Com. Co., 223 U. S. 573, 594, 596; U. S. v. Millar, 223 U. S. 599; Robinson v. Railroad, 222 U. S. 506. (b) Both shipper and railroad are bound by the obligation of the railroad, incurred, under the established rates and classifications and regulations, by the road's accepting the shipments and receiving or charging the rates. Railroad v. Wallace, 223 U. S. 481; Railroad v. Riverside Mills, 219 U. S. 186; Railroad v. Abilene Oil Mill, 204 U. S. 426, 440. (c) That which the shipper becomes entitled to from the railroad by paying the rates charged is of necessity as much regulated by the interstate commerce acts as the rates, for rates, without rights acquired therefor, or distinct from the particular rights accruing therefor, is meaningless. (d) No arrangement of the shipper or the railroad is valid which works an unjust discrimination. Interstate Commerce Acts of Congress. (e) At the trial appellant offered in evidence printed copies of the rates, classifications and regulations on file with the Interstate Commerce Commission, certified to by the secretary of that commission, as true copies of the records, and showed that they were open for inspection at the office in St. Louis where the goods were shipped. This was sufficient proof of the establishment of such rates, classifications and regulations. Railroad v. Albers Com. Co., 223 U. S. 573, 594; Railroad v. Oil Co., 204 U. S. 449.

Digitized by Google

A. M. Frumberg, R. P. Spencer and *A. R. Russell* for respondent.

(1) Plaintiff's demurrer to defendant's special defense was properly sustained: (a) Because it fails to show that there was an actual and reasonable valuation placed upon the goods. In re Released Rates, 13 Interstate C. C. R. 556; Hutchinson on Carriers, sec. 427; Railroad v. Jones, 132 Ala. 437; Railroad v. Huslett, 112 Tenn. 348; Railroad v. McIntire, 82 S. W. (Tex.) 346; Lace Curtain Mills v. Navigation Co., 145 Fed. 701; Hohl v. Norddeuscher Lloyd, 169 Fed. 990; Doyle v. Railroad, 126 Fed. 841; Railroad v. Lockwood, 84 U. S. 357; Leas v. Railroad, 157 Mo. App. 155, 136 S. W. 963. (b) Because it alleged nothing more than an implied contract based upon constructive notice to the shipper by the publication of rates and classification and did not allege an express and special contract limiting the liability of the defendant. Glass Co. v. Railroad, 156 Mo. App. 178, 136 S. W. 757. (c) It did not allege that two or more rates existed and that plaintiff had accepted the lower rate. Leas v. Railroad, 157 Mo. App. 155, 136 S. W. 963; George v. Railroad, 214 Mo. 551. (d) The facts alleged in the answer do not show that defendant was a special and not a common carrier of goods. Moore on Carriers, 101; Hutchinson on Carriers, sec. 153; Railroad v. Lockwood, 84 U. S. 507; Steam Co. v. Phoenix Ins. Co., 129 U. S. 441. (2) Plaintiff is not bound by invalid or illegal provisions inserted in the bill of lading. Powder Mfg. Co. v. Railway Co., 101 Mo. App. 442, 196 Mo. 663. (3) No immunity or privilege created by the interstate commerce law having been asserted or denied or involved in this action, the rights and liabilities of the parties are to be determined by the law of this State. Railroad v. Hughes, 191 U. S. 447; Railroad v. Solan, 169 U. S. 133; Railroad v. Tobacco Co., 169 U. S. 311; Railroad v. Haver, 169 U. S.

Digitized by Google

613; Calderon v. Steamship Co., 170 U. S. 272; Railroad v. Ohio, 173 U. S. 285; Railroad v. Illinois, 177 U. S. 514; United States v. Thompson, 93 U. S. 587; Latta v. Railroad, 172 Fed. 850.

NORTONI, J.—This is a suit for damages accrued through the alleged breach of a contract pertaining to an interstate shipment of freight. Plaintiff recovered and defendant prosecutes the appeal.

Plaintiff is a manufacturer of silver plated ware in St. Louis and defendant is a common carrier engaged in interstate traffic. The shipment involved three boxes of silver plated ware from St. Louis, Missouri, to Peoria, Illinois, two of which boxes were lost in transit, and for the alleged value of these—that is $4764.04—the suit is prosecuted. There is no suggestion in the case that the loss occurred through negligence. Indeed, it is not revealed how nor where the goods were lost, but it does appear they were lost in transit through some means while in the possession of the carrier and therefore never delivered.

The suit proceeds as in assumpsit for the alleged value of the goods lost—that is $4764.04—invoking the obligation of an insurer, which, it is said, inheres in the transaction because of its nature and that of defendant's calling. Defendant had fully complied with the requirements of the Interstate Commerce Act and filed with the Interstate Commerce Commission its tariff sheets including rates, schedules and classifications pertaining to such shipments of interstate freight, and such rates, schedules and classifications had been duly approved by the commission and were posted, in accordance with the provision of law, in defendant's freight depot in St. Louis at the time the contract of affreightment was made. By these schedules and classifications so on file and promulgated, defendant had established two rates of freight with respect to such shipment between St. Louis and Peoria, Illinois, which,

Digitized by Google

together with the conditions and classifications attached thereto and revealed in the tariff sheets, had been duly approved by the Interstate Commerce Commission. One of these rates, that is the lower, it appears, was fixed, determined and approved, together with the condition annexed thereto, to the effect the carrier's liability should be limited thereunder in accordance with the classification and schedules revealed in the tariff sheets, while the other, or higher rate, was fixed, determined and approved as a proper compensation for carriage with the full carrier's liability annexed. The tariff sheets and classifications therein contained provide that all shipments made under the lower rate shall be subject to a maximum liability for loss of goods on the part of the carrier of ten times the freight paid. The higher rate provided in the tariff sheets is double the reduced rate referred to and is without limitations as to carrier's liability annexed—that is, such rate is available to all persons desiring to ship, without any limitation as to the right of the shipper under the law, in event of loss of or damage to his goods while in possession of the carrier.

It appears plaintiff, by its manager, delivered the consignment of plated ware to defendant at its freight office in St. Louis, and, indicating his purpose to ship it to Peoria, Illinois, requested a bill of lading therefor. Upon defendant's agent inquiring the character of the goods and their value, plaintiff's manager replied that the consignment consisted of plated silverware and its value was "close to $5000." Thereupon defendant's agent issued to plaintiff the shipping contract in suit here, which is an ordinary bill of lading, describing the shipment as three boxes of plated ware, but without fixing any value thereon whatever. Defendant's agent exacted a freight charge for the through shipment of $4.17, which plaintiff paid at the time. Such is the lesser tariff rate fixed for such shipments under the limitations on the carrier's lia-

Digitized by Google

bility above stated. There is no suggestion in the bill of lading as to the actual value of the goods, nor is there anything contained therein, pertinent to the present controversy, resembling an agreed valuation as the amount recoverable in event of loss, save an apt reference to the valuation determined by the classifications or tariffs upon which the rate of freight is based. The bill of lading recites defendant "received" the consignment "subject to the classifications and tariffs in effect on the date of issue of this original bill of lading." One of the conditions printed in the bill of lading touches upon the subject of agreed valuation, and, in so far as pertinent here, refers to the classifications and tariffs upon which the rate of freight is based for the criterion to determine the extent of the liability of defendant to compensate the shipper in event the goods are lost or damaged while in its possession. We copy this condition of the contract here, but the italics are our own.

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, *unless a lower value* has been represented in writing by the shipper or has been agreed upon or *is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation*, whether or not such loss or damage occurs from negligence."

There was no "lower value" "represented in writing by the shipper" and there was none *expressly* agreed upon between plaintiff's manager and defendant's agent, when the contract evidenced by the bill of lading was entered into. Therefore, the only relevant provision of the condition of the shipping contract above copied touching the value is that which

Digitized by Google

refers to the tariffs and classifications and which we have italicized.

Defendant set forth in its answer the fact that it had complied with the Interstate Commerce Act and had on file at the time of the contract of the shipment its tariff sheets, including rates, schedules and classifications, and that the same were duly posted in its freight offices in St. Louis, revealing the two rates together with the conditions annexed thereto as hereinabove stated, and insisted that, by entering into a contract of shipment under the lesser of the two rates, plaintiff agreed that the amount of the recovery, in case of loss of the goods, should be ten times the amount of the freight charge, that is, $41.70, which it offered to pay. The court treated these facts as unavailing in defense of the suit, and, over the objection and exception of defendant, permitted plaintiff to prove the full value of the silver plated ware lost in transit, and found such value to be $2328.65. Judgment was accordingly given for plaintiff for this amount.

The principal question for consideration relates to the matter of incorporating in the shipping contract the provisions of defendant's tariff pertaining to the rate and the limitations annexed thereto under its schedules and classifications. It is insisted by plaintiff that the valuation of ten times the freight paid stipulated in the tariff sheets is not to be regarded as parcel of the contract of shipment, for the reason that such would operate a limitation upon the liability of the carrier at common law, of which no part is to be forgiven in any case except on the *express* assent of the shipper, and that the contract of affreightment contains no express provision touching the matter, as in the case of an agreed valuation. It is argued, furthermore, that here plaintiff declared the value of his goods at the time the shipment was made to be "close to $5000" and notwithstanding defendant, on receiv-

Digitized by Google

ing them and issuing the bill of lading of its own volition, fixed the freight charge at $4.17, without any request from plaintiff for such rate.

Much is said in the briefs concerning the rule of decision which prevails in Missouri as to limitations upon the carrier's common law liability, but all of this is to no avail in the instant case, for the reason the shipment is interstate in character and falls within the purview of the act of Congress touching interstate commerce. Congress, having manifested its purpose through the enactment of the Interstate Commerce Act to take possession of the subject of the liability of carriers by railroad on account of interstate shipments, as appears by reference to the Interstate Commerce Act and its amendments, including that of June 29, 1906 (34 United States Stat. at Large, 584), and especially bills of lading and shipping contracts through what is known as the Carmack Amendment, incorporated in section 20 of that Act, page 595, such legislation and the decisions of the Supreme Court of the United States expounding it supersede all State regulations and rules of decision on the subject. The Federal statutes touching this matter and the decisions of the Supreme Court of the United States construing them afford an exclusive rule for the determination of controversies pertaining to the subject. This is true, too, notwithstanding the provision of the Carmack Amendment, to the effect that the enactment shall not deprive any holder of a bill of lading of any remedy or right of action that he had under the existing law, for this is construed to refer alone to existing Federal law. [See Adams Express Co. v. Croninger, 226 U. S. 491; Chicago, Burlington & Quincy R. Co. v. Miller, 226 U. S. 513; Chicago, St. Paul, etc., Ry. Co. v. Latta, 226 U. S. 519.] When we come to examine the rule of decision being evolved in the Federal Supreme Court with respect to interstate shipments, it is ascertained that the tendency is to determine the right re-

Digitized by Google

specting the amount and value of the recovery by reference to the rate at which the shipment was made, and the doctrine of estoppel is invoked against the shipper to preclude him from claiming more than the rate paid would purchase according to the tariff provisions of which he is deemed to be fully advised. Obviously this doctrine does not comport with that which obtains in Missouri and is frequently administered in our courts, for here we declare that the full common law liability is annexed to every transaction of affreightment entered into with a common carrier, unless it is expressly forgiven by the shipper, and this, too, upon a valuable consideration.

But it is argued this doctrine proceeds under the Interstate Commerce Law on the theory that the shipper has declared the value of his goods at a small amount and obtained the lower rate on a representation to that effect, in which event it is just to preclude his right to recover more on the theory of an estoppel, for he thus voluntarily availed himself of the benefits which lie in the lower rate and thereby diminished the earnings of the carrier through representing his goods of the lesser value. It is argued that, however just the doctrine may be in a proper case, it should not obtain here for the reason plaintiff declared the value of his goods at the time the shipment was made to be "close to $5000" and made no request with respect to the rate. The rate, it seems, was selected by defendant's agent without inquiry on the part of plaintiff and the freight charge fixed at $4.17 in accordance with the tariffs with limitation of the carrier's liability, and it is clear no misrepresentation as to value was made by plaintiff to obtain it. But obviously this fact is not available here, for the suit proceeds on the contract as in assumpsit for its breach and not on the liability of the carrier annexed by law. There is no suggestion in the case that plaintiff was deceived or misled by de-

Digitized by Google

fendant's agent or that any fraud or imposition was practiced in negotiating the transaction pertaining to the shipment. This being true, all prior negotiations and conversation antecedent to the execution of the contract are beside the case, for they are deemed to have merged in the writing and the recovery is to be had, if at all, in accordance with the terms of the contract declared upon, insofar as they are valid and not illegal. [See Hart v. Penn. R. Co., 112 U. S. 331; O'Bryan v. Kinney, 74 Mo. 125; see, also M., K. & T. R. Co. v. Harriman Bros., 227 U. S. 657, 33 Sup. Ct. Rep. 397.] When no charge of fraud or deceit or sharp practice is relied upon in the case or suggested in the evidence, it is obvious that so much of the contract as concerns the rate of freight paid and the limitations of the carrier's liability annexed thereto is neither illegal nor void as against the declared public policy of the United States. [See Kansas City Southern R. Co. v. Carl, 227 U. S. 639; 33 Sup. Ct. Rep. 391.] In so far as the public policy of Missouri is concerned, we have none on interstate commerce, for the very good reason that Congress, having acted on the subject, under the power given it in the Federal Constitution, the sovereignty of the United States occupies the entire field and excludes whatever regulations or rules of decision heretofore obtained with us. [See Second Employers' Liability Cases, 223 U. S. 1; Adams Express Co. v. Croninger, 226 U. S. 491.]

The suit must, therefore, be regarded as proceeding upon and in affirmance of every provision of the contract revealed by the bill of lading on which the petition declares, after putting aside, as entirely without influence on the controversy, the fact that plaintiff represented the true value of the goods at the time. In this view, it is entirely clear that plaintiff is entitled to recover not exceeding $41.70 under the contract, for such is ten times the amount of the rate of freight paid on the entire shipment. Indeed, it may

Digitized by Google

be that, as but two boxes of silverware out of the three shipped were lost, he would not be entitled to so much; but the point is not made and will not be considered. The contract sued upon in plain terms stipulates that the shipment was received by defendant, subject to the classifications and tariffs in effect on the date of the issue of the bill of lading. Besides this, the amount of any loss or damage, it is stipulated, is to be computed on the basis of the value of the property—that is, the full invoice price—only when it appears that no lower value has been represented in writing by the shipper or has been agreed upon or "is determined by the classifications or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

Here, it is true, a lower value was not represented in writing by the shipper nor was a lower value expressly agreed upon, as is usual in the case of agreed valuations in the contract. But though such be true, the stipulation refers the matter of the value recoverable in event of loss to be determined by the classifications or tariffs upon which the rate is based. The rate of $4.17 was based upon the tariffs and classifications, which provide a limitation upon the liability of the carrier for loss of the goods to ten times the amount of the freight paid. Such is the contract declared upon and the provision appears to be in accord with the trend of decision in the Supreme Court of the United States in similar cases involving interstate shipments. Indeed, it seems that this provision of the contract is precisely in accord with the doctrine of that court, for it adheres throughout to the principle of estoppel, and declares a liability on the part of the carrier to respond for loss in proportion to the charge for the carriage paid, on the theory that a shipper may not obtain the benefit of the lower interstate rate

Digitized by Google

unless the conditions and limitations annexed to the rate are taken by him as well.

It is true the cases over which we have pondered reveal contracts of affreightment containing express provisions imposing the limitations upon the carrier's liability more explicit than the one in judgment here, but all of them refer to the rates and classifications, which, it is said, are fixed as a matter of law on filing with and approval by the Interstate Commerce Commission. The court proceeds on the theory that the shipper's knowledge of the lawful rate is conclusively presumed and he will not be heard to say he did not know it. Indeed, the rates, when duly filed and approved, are fixed by law and therefore not a subject of contract between the parties. [Texas & Pacific R. Co. v. Mugg,.202 U. S. 242; Drey & Kahn Glass Co. v. Mo. Pac. R. Co., 156 Mo. App. 178, 136 S. W. 757.] The broad purpose of the Interstate Commerce Act is to assure equality to one and all in the matter of interstate shipments and to prevent all manner of discriminations, either directly or indirectly, in favor of any shipper. Because of this the rates are fixed under the authority of the law and may not be varied to suit the exigencies of any particular case. From this premise, the Supreme Court of the United States, in expounding the statutes, rules, too, that the rates so established inhere with certain obligations and limitations on obligations which must be protected inviolate to one and all alike. This, it is said, is in order to effectuate the broad purpose of the enactment that no discriminations may be had, either directly or indirectly. Then, too, the rates are considered by that court and the Interstate Commerce Commission, in a measure, as premiums for insurance, and it is said it is proper to adjust them with the view to the obligation of the common carrier as an insurer so that fair remuneration may be had in collecting the rate in proportion to the value to be compensated in event the

Digitized by Google

loss occurs. The rates are therefore relative and based on valuation annexed.

Besides the cases of Kansas City Southern R. Co. v. Carl, 227 U. S. 639; 33 Sup. Ct. Rep. 391; M., K. & T. R. Co. v. Harriman Bros., 227 U. S. 657; 33 Sup. Ct. Rep. 397; Adams Express Co. v. Croninger, 226 U. S. 491, portraying this view, see, also, for the view of the commission, In The Matter of Released Rates, 13 Interstate Commerce Reports, 550. In this view, contracts of affreightment, which purport to stipulate a special privilege to the shipper not open to one and all alike in the schedules and classifications filed, are declared of no effect and unavailable. Such is the case of Chicago & Alton R. Co. v. Kirby, 225 U. S. 155. There Kirby, the shipper, paid the full tariff rate, and, according to his contract, was to receive expedited service, in that his shipment of horses from Springfield, Illinois, destined for New York, were to be carried so as to make connection with a certain train for quick passage at Joliet, Illinois. The connection was not made and the shipper sued as here for a breach of the contract. The Supreme Court denied the right to relief on the grounds that, though the full tariff rate was paid and the contract between the parties contemplated an expedited service, no such service was stipulated in the rate on file with the commission and therefore available to one and all alike. To sustain the suit would operate a discrimination. The principle obtains here, too, for if plaintiff may have full compensation for the value of its goods on paying the rate of $4.17, then the result would operate a discrimination in favor of it in that no such recompense is available to other persons at the same rate by the tariff and classifications on file.

The most recent case with which we are familiar is that of Kansas City Southern R. Co. v. Carl, Advance Sheets, 227 U. S. 639; 33 Sup. Ct. Rep. 391. A few excerpts from that opinion will illustrate the

Digitized by Google

views of the court on the question involved in the instant case. The court says, page 394, "When a shipper delivers a package for shipment and declares a value, either upon request or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped, upon plain principles of justice, from recovering, in case of loss or damages, any greater amount." Then, on page 395, the court says, "The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied must be conclusive in an action to recover for loss or damage a greater sum." Again, on the same page, the court reiterates a familiar expression contained in many decisions that "The rate of freight is indissolubly bound up with the valuation." Further on, in the same opinion, page 396, in speaking of the limitations which the carrier is permitted to annex to the tariff rates and incorporate in the shipping contract, the court says, "To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate."

From these expressions and the principle reflected throughout the authorities referred to, it is obvious that when the shipper contracts for an interstate transportation of his goods and avails himself of the lower rate, with apt reference in the contract to such rates and schedules on file with the commission and the values annexed, as in this case, his compensation, in the event of loss, is to be measured by the valuation of the goods on which the rate is established, for the rate and the valuation are indissoluble. No one can doubt that this doctrine of the cases referred to, in its broad significance impinges upon the old-fashioned way of entering into an actual contract as by the full and free assent of the parties, and works out a resulting contract otherwise made by the operation of law and the application of the principle of estoppel. But, be this as it may, the Supreme Court has but recently

Digitized by Google

declared there is no absolute freedom of contract and that the right may be regulated for the public good. [See Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186.] *But aside from this, plaintiff is estopped here from asserting that he did not select the rate and declare the value upon which it is fixed, for the very good reason that he sues on the contract of affreightment based thereon and affirms its validity and effect in every part.* [Fox v. Windes, 127 Mo. 502, 30 S. W. 323; Sage v. Finney, 156 Mo. App. 30, 135 S. W. 996; Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 S. W. 249.]

It is true the measure of compensation annexed to the rate of $4.17 for the shipment is meager and, no doubt, will entail especial hardship in the instant case, but be that as it may, the question of the reasonableness or unreasonableness of the rates and the conditions attached to them is not a juridical one for the courts to determine in the first instance, but rather is committed primarily alone to the Interstate Commerce Commission, and it is therefore our duty to treat with the rate and conditions annexed as reasonable and just in all respects whatever may be the view of the court on the subject. [Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 440, 441.]

Plaintiff insists that the judgment given in Drey & Kahn Glass Co. v. Mo. Pac. R. Co., 156 Mo. App. 178, 136 S. W. 757, is precisely in point here and sustains the proposition that full common law liability of the common carrier is annexed to every contract of shipment transported by a common carrier unless the shipper *expressly* assents to a limitation thereon. There can be no doubt that that case declares such to be the doctrine of the law, and it is supported by ample authority. Indeed, such has been the universal rule of decision, as we understand it. That case involved an interstate shipment, as here, but no contract pertaining to it was entered into between the shipper and

Digitized by Google

the carrier other than an implied one from the mere acceptance of the goods and the payment of the freight. Furthermore, the suit was not on the contract in that case, because there was no express contract of af-freightment, but instead it proceeded on the common law liability of the carrier as insurer, for the value of the goods lost in transit. The shipper there merely delivered the goods to the carrier and paid the freight, which appeared to be the lesser of the two tariff rates. No bill of lading was issued nor agreement of any kind made touching a limitation on the carrier's liability annexed by law. The goods were lost in transit and the shipper sued for their actual value and this we held he was entitled to recover in the circumstances stated. In so declaring the law, we asserted the doctrine announced by the Supreme Court of the United States in Hart v. Penn. R. Co., 112 U. S. 331, 340. We quote from the language of the court in that case touching the established rule of decision applied in the Drey & Kahn Glass Company case:

"As a general rule and in the absence of fraud or imposition, the common carrier is answerable for the loss of a package of goods though he is ignorant of its contents and though its contents are ever so valuable, *if he does not make a special acceptance.*" (The italics are ours.)

This doctrine, that the liability of the carrier attends every shipment unless expressly limited by the assent of the shipper, has ever obtained in this country as will appear by reference to the following authorities in point: New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U. S. (6 How.) 344, 382, 383; Railroad Co. v. Mfg. Co., 83 U. S. 318, 328, 329; 3 Ency. of U. S. Sup. Ct. Rep. 606, 607. Though the Hart and other cases cited were decided prior to the passage of the Interstate Commerce Statute, it appears the Supreme Court of the United States has rec-

Digitized by Google

ognized and declared the identical rule in respect of interstate shipments since that enactment became effective. The Interstate Commerce Act became a law in 1887, and the Supreme Court of the United States recognized and declared the identical rule above stated, and this, too, concerning an interstate shipment, as late as 1904, as will appear by reference to Cau v. Tex. & Pac. Ry. Co., 194 U. S. 427, 431. In view of this, we adhere to that doctrine, even in the matter of interstate shipments, and shall do so until the Supreme Court of the United States rules otherwise, which we may add, is very probable, according to the trend of recent decisions. But as a necessary corollary to that doctrine pertaining to interstate shipments, it should be said that, even where no actual contract of shipment is made, the carrier, in order to obviate a possible discrimination after loss and its full compensation, may sue the shipper and recover the higher rate of freight stipulated in the tariffs on file. Such is the view of the Supreme Court of New Hampshire, as appears from the recent case of American Express Co. v. Kimball & Nutter, 86 Atl. 258.

However all of this may be, the suit in the instant case is on the contract, and the contract declared upon, by express and appropriate words, refers to the tariff sheets and classifications on file for the valuation recoverable and as the one on which the rate of freight is based. It is clear that this express reference incorporates such valuations into the contract of shipment and the recovery is to be limited accordingly. It is clear, too, that no such question was in judgment in the Drey & Kahn Glass Company case for the very good reason that no actual contract of any kind was in suit there. At most, it was an implied one, but sufficient to invoke the obligations of a common carrier in favor of the shipper whose goods it took for transportation.

Digitized by Google

The judgment should be reversed and the cause remanded with directions to the trial court to enter judgment for plaintiff in accordance with the views herein expressed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

In re Estate of JOHANNA RYAN, Deceased.

St. Louis Court of Appeals, May 6, 1913.

1. **DEFINITIONS: "Widow."** The word "widow" signifies a woman who has lost her husband by death and is not married again.

2. **STATUTES: Statutory Construction.** It is the duty of the courts, in construing statutes, to interpret particular words by reference to the context, so as to effect the legislative intent as shown by the entire enactment, if such may be fairly ascertained, rather than to declare the precise meaning of the words standing alone.

3. ———: ———. Statutes in *pari materia* should be construed together.

4. **PARENT AND CHILD: Head of Family: Divorce.** Ordinarily the father is the head of the family, but, after divorce, the mother who remains unmarried may occupy that relation with respect to the children.

5. ———: **Support of Child: Divorce.** A minor child surviving his divorced mother is entitled to support from his surviving father, and a minor child of a deceased father is entitled to support from his mother, although she was divorced, unless it is possessed of independent means in its own right.

6. **EXECUTORS AND ADMINISTRATORS: Allowance to Minor Children.** Under Sec. 119, R. S. 1909, providing that, when a widow dies leaving minor children under sixteen years of age, they shall be entitled to the same allowances that she was entitled to take at the death of her husband, such children are entitled to those rights in the estate of the deceased mother, without regard to her interest in the estate of her deceased husband.

Digitized by Google

7. ———: ———: "Widow." Sec. 119, R. S. 1909, and kindred statutes, entitling minor children to certain allowances out of the estate of their deceased father or mother, although not in entire consonance with the common law, are highly remedial in character and are to be construed so as to carry out the spirit and purpose intended by the Legislature, and it is the duty of the court, as the case may require, to enlarge or restrain the meaning of words therein employed, to the end of effectuating the legislative intent; and, therefore, section 119, providing that, in case a widow shall die, leaving minor children under sixteen years of age, they shall be entitled to the same allowances she was entitled to take at the death of her husband, should, in view of the evident legislative intent to provide a sure support for the minor children, be construed to give a minor child under sixteen years of age, whose parents had been divorced, a right to an allowance out of the estate of its deceased mother, althoug its father was living.

8. **STATUTES: Statutory Construction: Remedial Statutes.** A statute which is highly remedial in character is to be construed so as to carry out the spirit and purpose of the Legislature, notwithstanding it is not in entire consonance with the common law, and it is the duty of the court to enlarge or restrain the meaning of words therein employed, to the end of effectuating the legislative intent.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm,* Judge.

REVERSED AND REMANDED (*with directions*).

Thomas D. Cannon for appellant.

(1) The court erred in denying appellant an allowance out of the estate of Johanna Ryan, deceased, in lieu of provisions not on hand at the death of his mother, for his support and maintenance, during the twelve months succeeding the mother's death. Johanna Ryan, deceased, was a widow within the meaning Sec. 119, R. S. 1909, and the movant is entitled to reasonable provision out of her estate for his support and maintenance during the twelve months after her death. Secs. 114, 115, 119, R. S. 1909; Lewis v. Cos-

Digitized by Google

tello, 17 Mo. App. 593; Rittenhouse v. Hicks, 23 Weekly Law Bul. (Ohio) 269; 10 Ohio Dec. 759; Kunkle v. Reeser, 5 Ohio, 401, 404; 40 Cyc. 934; Anderson v. McGee, 130 S. W. 1040, 1043. (2) The court erred in denying to the appellant the sum of $400, as prayed out of the estate of his mother Johanna Ryan, deceased. At the death of Johanna Ryan she was a widow in contemplation of Sec. 119, R. S. 1909, and the movant was entitled to the sum of $400 out of her estate, under the provisions of Sec. 115, R. S. 1909. Secs. 115, 119, R. S. 1909; 40 Cyc. 934; Kunkle v. Reeser, 5 Ohio, 401, 404; Rittenhouse v. Hicks, 23 Weekly Law Bul. 269; 10 Ohio Dec. 759; Anderson v. McGee, 130 S. W. 1040, 1043.

George W. Lubke and *George W. Lubke, Jr.* for respondent.

Because Ryan survived her Mrs. Ryan at her decease was not a widow within the meaning of the statute under which the appellant claims. Her divorce did not make her such. The term widow must, under the general statute of the State relating to the construction of statutes, be taken in its "plain or ordinary and usual sense." R. S. 1909, sec. 8057.

NORTONI, J.—This proceeding originated in the probate court and subsequently found its way by appeal to the circuit court. It involves the question of the right of a minor, under sixteen years of age, to allowances of absolute property out of the estate of its deceased mother, who at the time of her death was not a widow but rather a divorced woman. The circuit court denied the right to the allowances for the reason the mother of the minor child was not a widow at the time of her death, and the guardian and curator representing the minor prosecutes the appeal here.

Digitized by Google

It appears Johanna Ryan died in the city of St. Louis on the seventeenth day of September, 1910, leaving a minor son, Philip Ryan, aged seven years as her only surviving child. Mrs. Ryan left a small estate consisting of personal property which is in the hands of her administrator, appointed by the probate court of the city of St. Louis. Though Mrs. Ryan was unmarried at the time of her death, she was not a widow in the usual sense of that term, for the reason she had been divorced a few years before by virtue of a decree of the circuit court, and the care and custody of the minor child, Philip Ryan, was awarded to her. It appears, too, that her prior husband William F. Ryan, father of the child, Philip, who was born in lawful wedlock, survived her and is still living. The guardian and curator of the little child, Philip, presented an application to the probate court in proper form for the allowances out of his mother's estate which the statute awards to a widow out of the estate of her deceased husband. But it is said the probate court denied the application, and on appeal it appears the circuit court did so as well, for the reason Johanna Ryan, the mother of Philip, was not a widow at the time of her death.

The statute conferring the right to allowances as absolute property on minor children under sixteen years of age in the mother's estate purports to do so "in case a widow shall die" leaving such minor children. [See Sec. 119, R. S. 1909.] In denying the right to the allowances prayed for, the court proceeded on the theory that the word "widow" refers alone to a woman who has lost her husband by death and has not married again, and that therefore, though the little child was under sixteen years of age when his mother died, no right accrued to him under the statute because she was a divorcee and not a widow.

Digitized by Google

There can be no doubt that the word "widow" signifies "A woman who has lost her husband by death and is not married again." It is so defined in Webster's New International Dictionary. Bouvier's Law Dictionary defines a widow as "An unmarried woman whose husband is dead." Black's Law Dictionary and also Anderson's Law Dictionary define the word "widow" as "A woman whose husband is dead and who is not married again." The word "widow" is defined by a standard authority in the law as "A wife that outlives her husband; one whose husband is dead and who remains unmarried." [See 40 Cyc. 934.] All of these authorities concur to the effect that the word "widow" implies that a subsisting married relation should be severed by the prior death of the husband and not by a divorce decree. Therefore, though it appears, as it does, that Johanna Ryan had not remarried after the divorce and though she continued to be a single woman at the time of her death, she was not a widow.

But be this as it may, it is the duty of the court, in construing statutes, to interpret particular words by reference to the context so as to effectuate the intention of the lawmakers as reflected by the entire enactment, if such may be fairly ascertained, rather than to declare the precise meaning of the word standing alone. In this view, we believe the word "widow," employed in the second clause of the statute here involved, was intended to impart a broader meaning than that above defined.

But it is urged the statute (Sec. 8057) commands that in the construction of all statutes, words, other than those of technical import, should be taken in their plain or ordinary and usual sense, and therefore we must regard the word "widow" as intending no more than that which the dictionaries define it to mean. It is true the section of the statute referred to so

Digitized by Google

reads, but its command is conditioned as follows in express words: "unless such construction be plainly repugnant to the intent of the Legislature, or of the context of the same statute." From this it appears that we are not required to accord the word "widow" its usual meaning if such meaning be plainly repugnant to the intent of the Legislature or of the context of the same statute and we believe it is.

There are several statutes touching upon the rights here involved and they are therefore *in pari materia*. Because of this they should all be considered together, to the end of ascertaining therefrom the obvious intent of the lawmakers. Those statutes are as follows:

"In addition to dower, the widow shall be allowed to keep as her absolute property a family Bible and other books, not to exceed two hundred dollars; all the wearing apparel of the family, her wheels, looms and other implements of industry; all yarns, cloth and clothing made up in the family for their own use; all grain, meat, vegetables, groceries and other provisions on hand and provided and necessary for the subsistence of the widow and her family for twelve months; her household, kitchen and table furniture, including beds, bedsteads and bedding, not to exceed the value of five hundred dollars." [Sec. 114, R. S. 1909.]

"If the grain, meat or other provisions allowed the widow in the preceding section shall not be on hand at the time of taking the inventory, the court shall make a reasonable appropriation out of the assets of the estate to supply such deficiency." [Sec. 115, R. S. 1909.]

"In addition to the above, the widow may take such personal property as she may choose, not to exceed the appraised value of four hundred dollars,

Digitized by Google

for which she shall give a receipt." [Sec. 116, R. S. 1909.]

"In case of the death of a father leaving no widow, but minor children under sixteen years of age, such minor children shall be entitled absolutely to the property and allowances that the wife would have been entitled to, under the provisions of articles I to XIII, inclusive, of this chapter, if she had survived her husband; and in case a widow shall die, leaving minor children under sixteen years of age, they shall be entitled to the same property and allowances absolutely as the mother was entitled to take at the death of her husband." [Sec. 119, R. S. 1909.]

Section 119—that last above copied—is the particular section here under review. Sections 114, 115 and 116—that is, those first above copied—confer the right to certain absolute allowances on the widow in respect of her husband's estate upon his death. These statutes have been parcel of our law from an early day. In 1879 the Legislature contributed what is now section 119—last above copied—as will appear by reference to section 110, Revised Statutes 1879. It is obvious that the Legislature by this section intended to confer on the minor children under sixteen years of age of a deceased "father leaving no widow" the identical right in respect of the widow's absolute allowances in his estate which obtains in her favor if she survives her husband. As to this the statute is clear. It is clear, too, that if an unmarried father should die, leaving such minor children and a prior wife surviving him with whom the marriage relation had been severed by divorce, such minor children would be entitled to the allowances otherwise available to the surviving prior wife had she continued to sustain that relation until the death of her husband.

This is true because the father was unmarried at his death and the divorced wife is not the widow of

Digitized by Google

the deceased prior husband and as such entitled to enjoy a continuation of his exemption rights in allowances available to his widow under sections 114, 115 and 116. The minor children under sixteen years of age, who otherwise would have no right to such allowances, are therefore entitled to them. No one can doubt that the Legislature intended this result—that is, that such minor children of an unmmarried father who should die and with whom the marriage relation had theretofore been severed by either death or divorce are entitled to the allowances otherwise available to the widow. This being true, it seems clear that it intended to confer the same rights touching the exemptions the mother enjoyed as the head of a family on the minor children under sixteen years of age of an unmarried mother who should die leaving no widower, for it is manifest like rights were contemplated with respect to the exemptions allowed by law to the parent in either event. Obviously the Legislature did not intend to discriminate respecting these rights in the mother's estate because of her divorce. This view is sustained by the fact that the identical section of the statute now under consideration is declared to be an exemption statute and therefore designed to provide a sure support for the minor children under sixteen years of age. [See Lewis v. Castello, 17 Mo. 593.] Ordinarily the father is the head of the family, but, after divorce, the prior wife who remains unmarried until death may occupy that relation, too, with respect to the children. It appears that, with this in mind, the Legislature cast the exemption rights of the parents, though measured by the statute, upon the minor children under sixteen years of age. In declaring the policy of the State through a statute, it is as much the duty of the Legislature to secure a sure support for the children in the mother's estate, if she re-

Digitized by Google

mains single and unmarried after divorce, as in that of the father.

It is true that the minor child here is entitled as of right to a support from his father, William F. Ryan, who survives, and that such support may be enforced, but it is likewise true that the minor child of a deceased father is entitled to the support of its mother though she be divorced from her husband, unless such child is possessed in its own right of independent means. [29 Cyc. 1606, 1607, 1608; Girls' Industrial Home v. Fritchey, 10 Mo. App. 344.] And if the father should die leaving surviving no widow but a prior wife divorced, it is certain that his minor children under sixteen years of age by her would be entitled to the allowances in their father's estate, notwithstanding their right to a support from the mother yet living. There is, therefore, no valid distinction with respect to the right of the minor child to support from either parent sufficient to influence the judgment of the court here.

On first reading, the thought is suggested from the concluding lines of the statute (Sec. 119) that the Legislature designed only to transmit to the minor children under sixteen years of age the right which a widow possessed in respect of allowances in her deceased husband's estate, and therefore unless she was a widow at the time of her death so as to entitle her to such allowances, no right could be transmitted to the children by the fact of her death; but such is not true, for it has been expressly determined that such minor children are entitled to those rights in the estate of their widowed mother without regard to her rights in the estate of her deceased husband. [See Lewis v. Castello, 17 Mo. 593; Baer v. Pfaff, 44 Mo. App. 35.] This being true, such minor children of a mother who dies without leaving a widower should be regarded as entitled to the exemption right she en-

Digitized by Google

joyed in her lifetime as defined by section 119 and the same as those enjoyed by the father who dies without leaving a widow, for in either event an immediate support should be available in aid of the offspring through utilizing the exemption right which obtained during life in the parent but after their death to be determined by the statutes here quoted.

But it is said on two prior occasions this court has accorded to the word "widow" in the second clause of this statute its usual meaning and we should adhere to those decisions. Such is entirely true, but the question here made was not in judgment in either of those cases.

In the first of those cases (Lewis v. Castello, 17 Mo. App. 593) it appeared the father died first and a few months thereafter the mother died. The court held, of course, that the minor children were entitled to an allowance out of their mother's estate because they were under sixteen years of age and her husband was dead. In the second (Baer v. Pfaff, 44 Mo. App. 35) the mother died while the marital relation existed and the father of the children survived as her widower. On these facts the court held the minor children were not entitled to the allowances in the mother's estate because her husband survived. The question presented in each of those cases was so free from doubt as to require no consideration save a mere reading of the statute. The right affirmed in the one and denied in the other was, in the one case, so obviously within, and in the other without, the statute that no careful consideration of the intention of the Legislature in employing the word "widow" was required. Therefore the validity of those decisions is in nowise impaired by declaring here that the Legislature intended in using the word "widow" in the second clause of the statute to confer the right to the absolute allowances upon the children under sixteen years of age of a

Digitized by Google

mother who died without leaving a widower, as in the instant case.

It is not true, as suggested, that these statutes are to be construed strictly as in derogation of the common law and every word employed therein given effect so as to restrain the rights conferred. On the contrary, though they are not in entire consonance with the common law, they are highly remedial in character and are to be construed so as to carry out the obvious intention of the Legislature and effectuate the benign spirit and broad purpose contemplated, as was declared by the Supreme Court when, in construing the sense of the subsequent section—that is, section 120—conferring the same rights on a widower in his deceased wife's estate, the words "in addition to curtesy" therein were eliminated entirely, to the end of conferring the right to such allowances on a widower when no child had been born of the marriage. [See In re Ferguson's Estate, 206 Mo. 203, 104 S. W. 108.] Indeed, in construing statutes touching upon the rights of parties in cases of this character, it is the duty of the court, as the case may require, to enlarge or restrain the meaning of words employed, to the end of effectuating the manifest intention of the Legislature with respect to the subject-matter. [See Keeney v. McVoy, 206 Mo. 42, 103 S. W. 946.] In the case last cited the court substituted the word "descendants" for "children" so as to include grandchildren, which appeared better to subserve and to effectuate the intention of the Legislature in that behalf. See, also, Perry v. Strawbridge, 209 Mo. 621. 645, 108 S. W. 641, where the court interpreted the word "widower" in the statute providing that when the wife shall die without any child or other descendants her widower shall be entitled to one-half of her property, so as to restrain its ordinary meaning to a case where the husband became a widower through the ordinary vicissi-

Digitized by Google

tudes of life, and prevent his acquiring a right under the statute by his own criminal act of murdering her. In this view, the word "widow" should be enlarged so as to render the second clause of the statute under consideration as the counterpart of the first, for obviously the Legislature intended this result—that is to say, it intended that in event a mother should die leaving no widower but minor children under sixteen years of age, they should enjoy the same rights to exemptions as like minor children of a father, who dies leaving no widow, to exemption which he enjoyed during life.

The first lines of the statute are as follows: "In case of the death of a father leaving no widow but minor children under sixteen years of age, etc." The first line of the second clause is as follows: "And in case a widow shall die, leaving minor children under sixteen years of age, etc." The entire section purports to confer rights on the minor children under sixteen years of age and, of course, implies that the widow mentioned in the second clause shall be their mother, which is the counterpart of the word father in the first line of the first clause. Obviously this clause should read: In case a mother leaving no widower shall die but leaving minor children under sixteen years of age, etc.

By section 120, which came into our law first in 1895 (Laws of Missouri, 1895, p. 35), the widower is given the same rights in his deceased wife's estate that the widow enjoys under sections 114, 115 and 116 in her deceased husband's estate. We have not considered this section in connection with section 119 for the reason the latter came into our law in 1879 and we have therefore sought to deduce the intention of the Legislature there revealed without reference to subsequent legislation on the subject-matter of these allowances. But by reference to section 120, it appears that the Legislature intends, under the present state of the law, that the widower shall have like al-

Digitized by Google

lowances in his deceased wife's estate as she is entitled to in his estate. When section 119 is considered in connection with the rights of the widow in the husband's estate and the widower in the wife's estate, it would seem that the intention is, that the minor children under sixteen years of age shall be entitled to the allowances whenever the surviving parent may not claim them. It is obvious that William F. Ryan, the father of the little child here, is not entitled to an allowance in Johanna Ryan's estate for the reason the relation of husband and wife did not exist between the parties when she died, therefore section 120 is without influence here and the little child is substituted to the right which otherwise obtained in the father.

Furthermore the enlargement of the meaning of the word "widow" employed in the second clause of section 119 seems to be in keeping with the trend of the policy of the State as manifested through its legislative enactment touching these allowances, for the right thereto has been extended from time to time since the early history of our law. First, the widow alone was given such allowances in her deceased husband's estate by statutes substantially the same as sections 114, 115 and 116. Then in 1879 the right was extended to the children under sixteen years of age in accordance with the statute then enacted. [Sec. 119.] Thereafter, in 1895, the Legislature extended the right again and conferred it upon the widower upon the death of his wife as to like allowances in her estate. [See Sec. 120.] But this section as originally enacted conferred the right "if the wife shall die *intestate.*" Thereafter, in 1906, this court determined that the right of the widower was limited by the employment of the word "intestate" so that no right was conferred upon him when she died "testate." [Black v. Brittain, 116 Mo. App. 386, 92 S. W. 500.] Thereafter, in furtherance of the trend to enlarge the right to take such allowances, the Legislature amended this

Digitized by Google

statute so as to read: "If a wife shall die testate or intestate" her widower shall be accorded such allowances, and so the statute reads at the present time. [See Laws of Missouri 1909, p. 94; Sec. 120, R. S. 1909.] It, therefore, appears that the right of the widower was enlarged by this enactment so as to cast the right of such allowances on him whether his wife died testate or intestate. From this history of the statutes, it is clear that the Legislature has manifested an intention throughout of extending the right with respect to these allowances and enlarging the class of persons to take them. However, the subsequent legislation referred to and its history is by no means controlling here and is mentioned only as a circumstance indicative of the public policy of the State with respect to the subject-matter.

The judgment should be reversed and the cause remanded with directions to the trial court to proceed in accordance with the views above expressed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

CHARLES E. COLE, Appellant, v. JOHN H. CRUMP et al., Respondents.

St. Louis Court of Appeals, May 6, 1913.

1. **REAL ESTATE BROKERS: Right to Commission.** Where the owner sells his land to the customer of a broker employed by him, it is not essential to the broker's right to recover a commission that the sale be completed within the time or at the price fixed in the contract of employment, provided the broker initiated the transaction within the time limited and the transaction thus initiated was continued by the subsequent dealings between the owner and the customer.

2. ———: ———. The mere fact that land is not conveyed to a real estate broker's customer, but to a third party, will not prevent the broker from recovering a commission, provided

Digitized by Google

it appears that such was the manner the parties chose to effectuate the sale initiated by the broker under his employment.

3. ———: ———: **Facts Stated.** A contract with a real estate broker stipulated that the owner would pay him a commission on the price of the land optioned to a third person, on condition that a sale was made to him. The contract and the option were executed at the same time and delivered to the broker. The option expired, and the owner thereafter gave the third person another option, and after it expired, the owner sold the property to a corporation whose entire capital stock, with the exception of four shares, was owned by the third person, at a price greater than the option price. *Held*, that, inasmuch as the employment contract did not limit the right to recover a commission to a sale under the option and within the time and on the terms specified, the broker was entitled to a commission, if the jury found that he was the procuring cause of the sale, even though the sale was not made under the first option nor at the price therein specified. *Held, further*, that it was a question for the jury, whether the sale to the corporation was not tantamount to a sale to the person named in the contract of employment.

4. ———: ———: **Instructions.** Where, in an action by a real estate broker for a commission, the evidence showed that the broker was employed to sell the real estate to a third person who had an option to purchase it, that, upon the expiration of the option, defendant gave the third person a second option, and, after the expiration of that option, sold the property to a corporation organized by him, and the facts justified a finding that plaintiff was the procuring cause of the sale and that the sale to the corporation was equivalent to a sale to the third person, an instruction that, before plaintiff could recover, the jury must find that the property was sold to the corporation "in pursuance of and under the renewal option," was misleading, as leading the jury to believe that it was a condition precedent to plaintiff's right to recover that the renewal option continued in force to the time of the conveyance, when, as a matter of fact, such was not a condition precedent.

5. **INSTRUCTIONS: Conflicting Instructions.** The giving of a misleading instruction constitutes reversible error, although another instruction correctly declares the law with respect to the subject-matter covered by the misleading instruction.

Appeal from Washington Circuit Court.—*Hon. E. M. Dearing*, Judge.

Digitized by Google

REVERSED AND REMANDED.

Edw. T. Eversole for appellant.

S. G. Nipper and *H. B. Irwin* for respondents.

There is no inconsistency or conflict between instructions given on behalf of appellant and respondents. And under the allegations in appellant's petition hereinbefore quoted, and the evidence, instruction No. 1 given on behalf of respondents correctly declared the law. Church v. Railroad, 119 Mo. 203; Herman v. Compton Hill Imp. Co., 58 Mo. App. 480; Baker v. Railroad, 122 Mo. 533.

NORTONI, J.—This is a suit by a real estate agent for his commissions. The finding and judgment were for defendants, and plaintiff prosecutes the appeal.

Defendants owned 120 acres of land which they desired to sell, and plaintiff was engaged in blocking parcels of mineral land together and selling it for mining purposes to those engaged in such business. It appears that defendants employed plaintiff by a written contract to sell their lands to one Gorge J. Cole, who was engaged in the mining business in St. Francois county. By the terms of the contract of employment, defendants agreed to pay plaintiff five per cent on the purchase price, which, according to an option executed concurrently therewith, was to be sixty dollars per acre. The written contract by which plaintiff was employed is as follows:

"We, the undersigned, hereby agree to pay Charles Cole the sum of five per cent of the purchase price of our land this day optioned to George J. Cole, on condition that the sale is made to the said Cole. (Signed) John Crump, Martha Crump."

On the same day and concurrently with the execution of this writing, defendants executed an option

Digitized by Google

in writing on their land to George J. Cole and delivered it to plaintiff, along with his contract of employment whereby they agreed, in consideration of one dollar, to convey the land therein described to George J. Cole, in consideration of sixty dollars per acre, at any time to suit his convenience, within sixty-five days from that date.

Plaintiff interested George J. Cole, the proposed purchaser, in the land and the evidence tends to prove that he persuaded him to purchase the same but not immediately. Before the same was consummated, the option expired and defendants executed a new one to George J. Cole, whereby they agreed to convey the lands to him any time within one year after its date for the price and on the terms thereinbefore mentioned. The time limit prescribed in the second option was permitted to expire without the sale being finally concluded, but four months after its expiration, George J. Cole purchased the land from defendants at the price of sixty-five dollars per acre.

The evidence tends to prove that the negotiations were pending from the time plaintiff interested Cole under the first option until the conveyance was finally executed by defendants to the Irondale Lead Company, which corporation, it appears, was organized by George J. Cole to take the title to such land. While the evidence is abundant, and, indeed, not denied, that plaintiff interested George J. Cole in the land, who agreed to take it, it does not appear that he personally negotiated the subsequent, that is, the extension of the original, option thereon between defendants and George J. Cole, or personally participated in closing the deal when the conveyance of land was finally made to the Irondale Lead Company. The second option, that is, the extension of the first, and the subsequent purchase of the land after its expiration, appear to have been negotiated with defendants by George J. Cole, to suit his own convenience but in furtherance

Digitized by Google

of the original option taken by plaintiff. The case seems to have been tried on the part of defendants on the theory that though plaintiff interested George J. Cole in the land and induced him to say he would take it, he is not entitled to recover commissions on account of the sale subsequently consummated, for the reason it was not made during the time the option contract existed and entailed a valid and enforcible obligation against defendants and that it was not made at the price of sixty dollars per acre as therein stipulated and directly to George J. Cole. Obviously this is an erroneous view, for though plaintiff did not personally obtain the extension of the option and though he was not actively participating when the deal was finally closed and though the final conveyance was made after the option had expired as an enforcible obligation, he is nevertheless entitled to his commissions if it appears to the satisfaction of the jury that he was the procuring cause of the sale and defendants received the benefit of his services thereabout. This is true even though defendants subsequently consummated the transaction with the purchaser under a modified agreement with him whereby the original price of sixty dollars per acre was advanced to sixty-five dollars and executed a deed to the corporation which Cole organized to receive the title to the land. [See Bell v. Kaiser, 50 Mo. 150; Tyler v. Parr, 52 Mo. 249; Weisels-Gerhart R. E. Co. v. Epstein, 157 Mo. App. 101, 137 S. W. 326; Lane v. Cunningham, 171 Mo. App. 17, 153 S. W. 525.]

Though the employment contract above copied contemplates that plaintiff should have five per cent commission on the purchase price for selling the land to George J. Cole, it does not in terms require or stipulate that such commissions are to be paid only in case the sale is made under the option taken concurrent therewith and within the period prescribed in

Digitized by Google

the written option or for the precise price mentioned therein. It is true both the option and the contract are to be considered together, but in view of the fact that the employment contract does not limit the matter to the precise time and on the terms only then provided or to be provided in the option, it is competent, too, to consider the second or extension option executed by defendants to plaintiff's customer and the fact that they conveyed the land to him after its expiration at an increased price. If plaintiff performed his part, under the original contract of employment and the option, by procuring a purchaser who subsequently took the land at a price equal to that stipulated, the mere fact that defendants extended the original option and after its expiration varied the price and sold the land to plaintiff's customer may not be regarded as conclusive against the right of recovery. No one can doubt that it was competent for defendants to grant further time, as they did, under the extended option, and as they did after its expiration without renewal of its legal obligation, and vary the price as by exacting a larger sum from the purchaser. Even then plaintiff is entitled to recover if the jury should find the fact to be that he was the procuring cause of the sale eventually made—that is, that the original transaction initiated by plaintiff was availed of by defendants and continued by them and finally consummated with his customer, George J. Cole, two years thereafter, at a price at variance with that originally contemplated. Where the sale is actually made through the act of the owner closing the deal with the customer of the real estate agent, it is not essential to the right of recovery by the agent as for commissions to show the sale was completed within the period of time prescribed in the contract of employment or an option on the property, provided it sufficiently appears that the agent initiated the transaction of purchase within the prescribed time and

Digitized by Google

may therefore be regarded as the procuring cause. [Weisels-Gerhart R. E. Co. v. Epstein, 157 Mo. App. 101, 137 S. W. 326; also see Goffe v. Gibson, 18 Mo. App. 1.] But the right of recovery in such cases, and in this one, of course, depends upon the fact that the original transaction pertaining to the contemplated sale which plaintiff (agent) initiated was continued by the subsequent dealings between the owners (defendants) and the agent's customer (George J. Cole) or some one representing him.

It should be said here, however, that plaintiff claims five per cent on sixty dollars per acre only—that is, the price stipulated in the original option—and lays no claim to a commission on the additional five dollars per acre received through defendant's own efforts. Therefore, his right to recover commissions on such additional purchase money is not involved in the case now under consideration here. It is entirely clear that the question as to whether or not plaintiff was the procuring cause of the sale was for the jury, and this is true though the sale was finally concluded after the time limit of the second option had expired and at an increased price over that first demanded.

Throughout the trial, considerable stress was laid upon the fact that the sale was finally consummated by conveying the property to the Irondale Lead Company, and it was urged that such was not a sale to George J. Cole within the terms of the employment and the option. But it is clear the question was one for the jury. The mere fact that the deed is executed to a third party by the owners of the property is wholly immaterial on the right of the agent to recover his commissions on account of the sale, provided it appears that such was the manner the parties chose in effectuating the sale which the agent initiated under his employment. [See Goodson v. Embleton, 106 Mo. App. 77, 80 S. W. 22.] But the jury should be re-

Digitized by Google

quired to find that the sale eventually made to the Irondale Lead Company was a consummation of the negotiations originally initiated through the agency of plaintiff with George J. Cole.

It appears that George J. Cole organized the Irondale Lead Company shortly before the deed from defendants to it was executed. The capital stock of this corporation is one million dollars, divided into 10,000 shares. George J. Cole is one of its directors and the president of the company. He owned all of the preferred stock—that is, 2000 shares—and 7996 shares of the common stock. In other words, he owned all of the stock of the company save four shares of the common stock which were held by four other persons who together with him constituted the board of directors. From these facts and others in evidence, it was certainly competent for the jury to find that the sale made to the Irondale Lead Company, of which George J. Cole was president, was tantamount, under the terms of plaintiff's employment, to a sale to George J. Cole in person.

For plaintiff, the court instructed that a recovery might be had though it did not appear defendants were under a legal obligation as by an option contract to convey the land at the time the conveyance was executed, provided the land was conveyed to George J. Cole or a corporation at his instance in consummation of a sale originally initiated by plaintiff under his employment. The theory of this instruction is sound and in accord with what is said above, but defendants' instruction No. 1 appears to be in conflict with it when considered in view of the facts, or, at least, highly misleading. By defendants' instruction the jury were told that before plaintiff could recover they must find from the evidence that defendants' land was sold "and transferred to the said Irondale Lead Company, in pursuance of and under the renewal option from defendants to George J. Cole, and unless you so

Digitized by Google

believe and find from the evidence your verdict must be for the defendants." The employment of the words "in pursuance of and under the renewal option" in the instruction suggests that, before plaintiff could recover, the renewal or second option to which they refer must be found to have continued in force up to the time of the conveyance and that the right of recovery depended upon such fact. Obviously a sale made in pursuance of and under the option implies that such option must be in force at the time. Plaintiff's right of recovery did not depend upon this fact, and the instruction is therefore so misleading as to be prejudicial to his rights. Because of this, the judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

CHARLES E. COLE, Appellant, v. JAMES MARLER et al., Respondents.

St. Louis Court of Appeals, May 6, 1913.

REAL ESTATE BROKERS: Right to Commission: Instructions. In an action by a real estate broker for a commission for effecting the sale of land, there was evidence tending to show that plaintiff was employed to sell the land to a third person who had an option to purchase it at $60 per acre; that the option was twice renewed by defendant, the last renewal stipulating that the price should be $65 per acre; that, prior to the expiration of the last renewal, the land was sold to a corporation organized by the third person, plaintiff's evidence being, that the price was $60 per acre, while defendant's evidence was, that the price was $65 per acre. The court instructed, at the instance of defendant, that before plaintiff could recover, the jury must find that the land was sold in pursuance of and under the renewal option. *Held*, that the instruction was erroneous for denying a recovery if the jury found that the sale was for $60 per acre; plaintiff being entitled to recover if he was the procuring cause of the sale, regardless of whether or not the sale was made under and in pursuance of the renewal option.

Digitized by Google

Appeal from Washington Circuit Court.—*Hon. E. M. Dearing,* Judge.

REVERSED AND REMANDED.

Edward T. Eversole for appellant.

S. G. Nipper and *H. B. Irwin* for respondents.

NORTONI, J.—This is a suit by a real estate agent for his commissions. The finding and judgment were for defendants and plaintiff prosecutes the appeal.

Defendants owned 120 acres of land which they desired to sell, and plaintiff was engaged in blocking parcels of mineral land together and selling it for mining purposes to those engaged in such business.

It appears that defendants employed plaintiff by a written contract to sell their lands to one George J. Cole, who was engaged in the mining business in St. Francois county. By the terms of the contract of employment, defendants agreed to pay plaintiff five per cent on the purchase price, which, according to an option executed concurrently therewith, was to be sixty dollars per acre. The written contract by which plaintiff was employed is as follows:

"We, the undersigned, hereby agree to pay Charles Cole the sum of five per cent on the purchase price of our land this day optioned to George J. Cole, on condition that the sale is made to the said Cole.

"(Signed.)

"JAMES MARLER,

"DELILLIA MARLER."

On the same day and concurrently with the execution of this writing, defendants executed an option in writing on their lands to George J. Cole and delivered it to plaintiff, along with his contract of employment, whereby they agreed in consideration of one

Digitized by Google

dollar, to convey the land therein described to George J. Cole, in consideration of sixty dollars per acre, at any time to suit his convenience, within sixty-five days from that date.

Plaintiff interested George J. Cole, the proposed purchaser, in the land and the evidence tends to prove that he persuaded him to purchase the same but not immediately. Before the same was consummated the option expired and defendants executed a new one to George J. Cole, whereby they agreed to convey the land to him any time within one year after its date for the price and on the terms thereinbefore mentioned. The sale was not consummated under this option and the time limit therein was allowed to expire, but the option was renewed by the execution of a new one on the part of defendants to George J. Cole, whereby the time was further extended and the price fixed at sixty-five dollars per acre. The negotiations were pending about two years under the original and two subsequent options on the land, but on the day the last, or third, option expired, defendants executed a general warranty deed, conveying the identical land described in all of the options to a corporation, the Irondale Lead Company, which it appears, was organized by George J. Cole to take the title thereto, and for such conveyance received the purchase price of either sixty dollars or sixty-five dollars per acre.

For other and additional facts and our views of the law touching them, see the companion case of Cole v. Crump, 174 Mo. App. 215, 156 S. W. 769, decided today. The two cases involve like contracts of employment and arise out of similar transactions had by plaintiff with the different defendants on the same date. Like options were given in each instance and this case is different from that cited only in that the option here was renewed twice, whereas in the former but one renewal appears. Furthermore, the sale of

Digitized by Google

the land here involved made to the Irondale Lead Company was consummated on the day the third option between defendants and George J. Cole expired, while in the former the sale was completed four months after the second, or last, option expired.

The evidence for plaintiff tends to prove that defendants finally sold the land in accordance with the third option given to Cole, except the price was sixty dollars per acre; while that of defendants tends to prove that they sold it for sixty-five dollars per acre.

For defendants the court gave the following instruction:

"The court instructs the jury that before you can find for the plaintiff in this case, you must believe and find from the testimony that the real estate mentioned in the plaintiff's petition and described in the deed from defendants to the Irondale Lead Company was sold and transferred to the said Irondale Lead Company, in pursuance of and under the renewal option from defendants to George J. Cole, and unless you so believe and find from the evidence, your verdict must be for the defendants."

By this instruction the jury were directed that plaintiff was not entitled to recover unless the land was transferred by defendants to the Irondale Lead Company in pursuance of and under the renewal option from defendants to George J. Cole. The third, or renewal, option referred to exacted a price of sixty-five dollars per acre for the land, whereas plaintiff was entitled to recover upon a finding of facts in accord with the law as stated in the opinion in the companion case referred to—that is, that he was the procuring cause of the sale and that it was made at sixty dollars per acre, the price authorized to him, or in furtherance of his efforts, if made at sixty-five dollars per acre as defendants insist. By making plaintiff's right of recovery depend upon the fact that the sale was effected in pursuance of and under the renewal

Digitized by Google

option which stipulated sixty-five dollars per acre, the court precluded his right of compensation on a sale at sixty dollars per acre, which, according to the evidence introduced by him was the actual price given for the land. In this case there can be no doubt that the sale was made in a measure in pursuance of the third, or renewal, option, for the conveyance of the land was had before that option finally expired. However that may be, plaintiff was entitled to recover if the sale was effected through his agency—that is, by his initiation and defendants' continuing the transaction—at sixty dollars per acre, and it is certain that such a sale, if made, was neither in pursuance of nor under the renewal option. Therefore, the instruction is erroneous in so far as it makes the right of recovery depend entirely upon the consummation of the sale being perfected in pursuance of and under the renewal option which stipulated the price at sixty-five dollars per acre.

For the reasons stated, the judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

W. R. PACE et al., Respondents, v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, May 6, 1913.

1. **RAILROADS: Waters and Watercourses: Lateral Ditches.** The duty of a railroad company, under Sec. 3150, R. S. 1909, to construct lateral ditches along its roadbed exists only when there are ditches, drains or watercourses with which such lateral ditches may connect, but it is not essential that the ditch, drain or watercourse with which they may connect be a running stream—it being sufficient if it be a lake or slough, adequate to receive, and furnishing an outlet for, the water complained of.

Digitized by Google

2. ———: ———: **Failure to Construct Lateral Ditches: Damages to Crops: Sufficiency of Evidence.** In an action against a railroad company for damage to growing crops, caused by its failure to construct lateral drains along its roadbed to carry off the water, as required by Sec. 3150, R. S. 1909, evidence *held* sufficient to establish that there was a ditch or drain with which the lateral ditches could have been connected, and hence it is *held* that the question of liability was for the jury.

3. **WITNESSES: Husband and Wife: Competency.** The husband or wife is competent to testify when he or she is a substantial party to the suit and is interested in the result, except as to confidential communications between them.

4. ———: ———: ———: **Married Women: Damage to Crops: Competency of Husband.** While the Married Woman's Act (Secs. 8304, 8308 and 8309, R. S. 1909 et al.) dissolved the prior unity of husband and wife and allows her to take the issues and profits of her separate estate, yet, in view of section 8308, providing that the natural products of the wife's land may be attached or levied upon to liquidate the husband's debts contracted for necessaries for the wife and family, a husband who lives with his wife on her land, cultivates it and employs the issues thereof for the livelihood of the family, has such an interest in such issues that, in an action by him and his wife for damages to growing crops, he is a competent witness.

5. **RAILROADS: Waters and Watercourses: Failure to Construct Lateral Ditches: Damages to Crops: Instructions.** In an action against a railroad company for damages to growing crops, caused by its failure to construct lateral ditches along its roadbed to carry off the water, as required by Sec. 3150, R. S. 1909, an instruction which did not require the jury to find that lateral ditches could have been connected with a sufficient ditch, drain or watercourse, and which did not require them to find that the draining of the water was obstructed or rendered necessary by the construction of the roadbed, was erroneous.

6. **DAMAGES: Destruction of Growing Crops: Measure of Damages: Instructions.** The measure of damages for the destruction of growing crops is the value of the crops destroyed, standing in the field at the time they were destroyed, and, therefore, it is error, in such an action, to permit a recovery for the market value of the crops in their matured state and after being garnered on the premises of the plaintiff.

7. ———: ———: ———: **Evidence.** In an action for damages for the destruction of growing crops, evidence of previous

Digitized by Google

yields upon the same or similar land, together with the cost of production and of the market price, is competent on the measure of damages.

Appeal from Stoddard Circuit Court.—*Hon. W. S. C. Walker,* Judge.

REVERSED AND REMANDED.

S. H. West, Roy F. Britton and *Wammack & Welborn* for appellant.

(1) Section 3150 on which this action is based does not require a railroad company to construct or maintain openings across or ditches along the sides of its roadbed except to connect with ditches, drains or watercourses. In an action under this statute the plaintiff must show that there are ditches, drains or watercourses with which the defendant company could have connected such ditches or openings, and unless the proof shows this no case is made under this statute. Field v. Railroad, 21 Mo. App. 600; Byrne v. Railroad, 47 Mo. App. 383; Collier v. Railroad, 48 Mo. App. 402; Graves v. Railroad, 69 Mo. App. 574; Ranney v. Railroad, 137 Mo. App. 537; Grant v. Railroad, 149 Mo. App. 313. (2) W. R. Pace being the husband of the real party in interest was disqualified as a witness in this case. Haerle v. Kreihn, 65 Mo. 202; Paul v. Leavitt, 53 Mo. 595; Wood v. Broadley, 76 Mo. 23; Layson v. Cooper, 174 Mo. 223; Flannery v. Railroad, 44 Mo. App. 396; Brindsmade v. Groll, 14 Mo. App. 444. The land on which the crops were destroyed, being the separate property of the plaintiff, Nancy Pace, and by the provisions of section 8309 the crops grown thereon were her separate property. The fact that the plaintiff, W. R. Pace may have rendered his services in cultivating and caring for these crops gave him no interest at law in them. They remained the separate property of Nancy Pace. Rogers v.

Digitized by Google

Wolfe, 104 Mo. 1; Seay v. Hesse, 123 Mo. 450; Curd v. Brown, 148 Mo. 82; Olson v. O'Connor, 9 N. D. 504; Phillips v. Hall, 160 Pa. St. 60, 28 Atl. 502; Rush v. Vought, 55 Pa. St. 437, 93 Am. Dec. 769; 21 Cyc. 1427. (3) The proper measure of damages in this case is the value of the crops at the time they were destroyed. Hunt v. Railroad, 126 Mo. App. 261; Anderson v. Railroad, 129 Mo. App. 384; Deal v. Railroad, 144 Mo. App. 684. (4) The instructions in a case must not be broader than the pleadings. Bank v.Murdock, 62 Mo. 73; Mansur v. Botts, 80 Mo. 658; Black v. Street Railroad, 217 Mo. 685; Hufft v. Railroad, 222 Mo. 303; Dagonia v. Railroad, 224 Mo. 589.

J. L. Fort and *K. C. Spence* for respondent.

NORTONI, J.—This is a suit for damage to growing crops. Plaintiffs recovered and defendant prosecutes the appeal.

The suit proceeds on the grounds of negligence for the failure of defendant to observe the duty enjoined by statute upon railroad companies to construct and maintain suitable ditches and drains along each side of the railroad, to connect with ditches and drains or watercourses, so as to afford sufficient outlet to carry off water which the embankment of such railroads may obstruct.

It appears defendant's railroad passes through plaintiffs' farm in Stoddard county, which consists principally of low bottom land. The evidence tends to prove that defendant omitted to construct ditches or drains along the sides of its railroad to connect with a drain or watercourse passing under the same through a trestle, and thereby obstructed the free flow of water so as to occasion it to accumulate on a parcel of land tilled by plaintiffs. That portion of plaintiffs' farm on which the growing crops were submerged during the years 1907, 1908, 1909 lays immediately west

Digitized by Google

of and adjacent to the railroad. The water flows from the hills situate about a quarter of a mile west of the railroad, across plaintiffs' land and, prior to the building of the railroad, to the southeast therefrom. The railroad embankment, it appears, is from three to seven feet in height where it passes through plaintiffs' farm, and upon building it, defendant left two openings or trestle ways through the same. One of these trestles is mentioned in the evidence as No. 19 and the other as 19a. It is said that, though defendant left the two openings in its embankment over which the trestle work is erected, it constructed no ditches along the sides of its road to connect therewith. Therefore, the flow of water was obstructed by the railroad embankment, so as to accumulate there and submerge the growing crops.

It is urged that plaintiffs are not entitled to recover for the reason it does not appear that there was any ditch, drain or watercourse with which defendant might connect lateral ditches along the side of its roadway to afford drainage for the land. The statute requires railroad companies, owning or operating any railroad, within three months after the completion of the road, to cause to be constructed and maintained suitable openings across and through the right of way and roadbed of such railroad, and suitable ditches and drains along each side of the roadbed to connect with ditches, drains or watercourses, so as to afford sufficient outlet to drain and carry off the water, including surface water along such railroad, whenever the draining of such water has been obstructed or rendered necessary by the construction of the railroad. [See Sec. 3150, R. S. 1909.]

There can be no doubt that the statute lays the duty to construct the lateral ditches contemplated only to connect with ditches, drains, or watercourses, and if there be no such ditches, drains or watercourses with which to connect the lateral ditches, the obliga-

Digitized by Google

tion does not obtain and, therefore, may not be violated. [See Cooper v. St. Louis, M., etc., R. Co., 123 Mo. App. 141, 100 S. W. 494; Ranney v. St. Louis & S. F. R. Co., 137 Mo. App. 537, 119 S. W. 484; Collier v. Chicago & A. R. Co., 48 Mo. App. 398; Williamson v. M., K. & T. R. Co., 115 Mo. App. 72, 90 S. W. 401.] But it is not essential that the ditch, drain or watercourse into which the railroad company is required to drain and with which it is required to connect by the construction of lateral ditches or drains, shall be a running stream. It is sufficient if it be a slough or lake and is adequate to receive and furnish an outlet for the water complained of. [See Cooper v. St. Louis, M., etc., R. Co., 123 Mo. App. 141, 100 S. W. 494.]

There is no complaint in the petition with respect to the failure of defendant to construct openings in and through its embankment, and it appears those constructed were sufficient. The complaint pertains alone to the failure to construct lateral ditches to connect with alleged drains which passed through the railroad embankment at the point where defendant had constructed the trestles. It is true the evidence is rather meager as to the existence of drains at these points. There is much in the case to suggest that the trestles were constructed at low places in the bottom which could not be regarded as either ditches, drains or watercourses. This material point in the case was poorly developed in the evidence, but enough appears to render the question one for the jury. It is true some of the witnesses spoke of these places where the trestles were built as "draws" or as "swags," but others dignified at least one of them as a slough and a watercourse. One witness said Tupelo slough commences right under the trestle and runs from there to No. 4 drainage ditch, which was constructed and is owned by Stoddard county. If this is true, it is obvious that this slough would afford "sufficient outlet to drain and carry off the water" turned into it by the lateral

Digitized by Google

ditches, for the case concedes that drainage ditch No. 4 which the slough intercepts is ample. Another witness said of this slough that it is a regular watercourse running southwest from the railroad, cutting a low "swag" in the bottom. In speaking of this slough, defendant's witness, a civil engineer, says that there seems to be "a depression of about one foot under that trestle there." There are a number of other statements by the witnesses throughout the record that suggests Tupelo slough to be a natural watercourse running under the trestle and connecting with drainage ditch No. 4. It is true this slough was shallow at the point in question and no doubt dry a good portion of the year, but be this as it may, it appears to be a drain provided in the economy of nature to carry off the surplus waters and so situate under defendant's railroad as to receive the outlet from drains or lateral ditches which could have been connected therewith. It is clear the case is one for the jury.

It appears the land on which the growing crops were destroyed by the accumulation of water thereon was owned by Nancy C. Pace, the wife and coplaintiff of W. R. Pace. Both husband and wife are parties plaintiff. Mrs. Pace was not introduced as a witness, but her husband, W. R. Pace, gave testimony in aid of their suit. It was objected that he was incompetent to testify on account of the relation of husband and wife and because he was but a nominal party and his wife sole party in interest. While it appears Mrs. Pace owned the land, it appears she and her husband occupied it together and that he put out and tended the crops as is usual in such cases. It is urged that the court erred in permitting the husband to testify under these circumstances and the theory advanced is that the crops on Mrs. Pace's land, though planted and cultivated by her husband alone for the use of both, are her sole and separate property, for the destruction of which she alone may recover. There can

Digitized by Google

be no doubt that the husband or wife is competent to testify when he or she is a substantial party to the suit and interested in its result, except as to confidential communications between them. [See Fugate v. Pierce, 49 Mo. 441; Harriman v. Stowe, 57 Mo. 93; Scrutchfield v. Sauter, 119 Mo. 615, 24 S. W. 137.] But it is said the husband is without substantial interest in the suit to recover for loss of crops on the wife's land put out and grown by him, even though the twain occupied the premises together in harmony as husband and wife and in virtue of the family relation. It is true that our Married Woman's Act dissolves the prior unity of husband and wife as to the property rights enumerated therein, and by those statutes the rents, issues and products of the wife's separate real estate belong to her. [Secs. 8308, 8304, 8309, R. S. 1909; Curd v. Brown, 148 Mo. 82, 49 S. W. 990; Brown v. Brown, 124 Mo. 79, 27 S. W. 552.] But even the Married Woman's Statute (Sec. 8308) recognizes and continues a substantial interest in the husband touching the annual products of the wife's land, in that by the proviso it renders them liable for the debts of the husband created for necessaries for the wife and family which the law casts the obligation on him to supply. Moreover it is determined that, where it appears the husband and wife live in harmony together occupying the wife's land and the husband tills it and employs the products in the usual way for the benefit of all, the law will not imply a contract between them whereby the husband should pay rent to the wife. [See Donovan, etc., v. Griffith, 215 Mo. 149, 114 S. W. 621.] Obviously this view suggests that the husband has a substantial interest in annual products of the wife's land when it appears the husband and wife reside thereon together and he tills the ground as a means of livelihood for himself and his wife and family. Therefore, we believe it is a just view, in those cases where the husband and wife reside together in

Digitized by Google

harmony on the wife's land, and he, in performance of his marital obligation to support and maintain the family, contributes of his labor and means in producing crops on her land, that he should be regarded as having a substantial interest in such crops, so as to enable him to testify, in a suit to which he is a party, for their destruction or loss through the tort of another. Especially is this true in view of the proviso to section 8308 continuing in the husband an interest which may be utilized to liquidate his debts contracted for necessaries for the wife and family.

For plaintiffs the court instructed the jury as follows:

"The court instructs the jury that if they shall believe and find from the evidence that plaintiffs' lands, described in the petition, were overflowed by high waters, in the years 1907, 1908, and 1909, and that said overflows were caused by the acts of the defendant in failing to construct or maintain ditches on the sides of its railroad where said railroad runs through said land sufficient to carry the water off of said land and that said overflows destroyed the crops planted and growing on about eight acres of said land in the year 1907 and about eight acres of said land in the year 1908, and about eight acres of said land in the year 1909 and that said crops were planted on said lands by the plaintiff in said years, *and that during the time said crops would have been maturing in said years, plaintiff was able and willing, and would have performed all the work and labor necessary to finish the cultivation of said crops, and that plaintiff, during all of said years, was able and willing, and would have performed all the work and labor necessary to put away, house, or garner, said crops, on the farm or place where they were planted; and that during the time, in said years, in which plaintiffs would have been engaged in finishing the cultivation, harvesting and garnering said crops, he was not able to find, and*

Digitized by Google

could not find, other employment which would yield him any thing of value, then your verdict should be for the plaintiff and you should assess his damages at a sum equal to the fair market value, during said years of said crops *in their matured state, and house or garner, on the premises of the plaintiffs.*"

Error inheres throughout this instruction. The instruction permits a recovery upon a finding of the mere fact that plaintiffs' lands were overflowed and that the overflows were caused by the act of defendant in failing to construct and maintain ditches on the sides of the railroad where it runs through plaintiffs' land sufficient to carry the water off the land, without requiring the jury to find that the railroad embankment obstructed the flow of the water and without requiring a finding that there was a sufficient drain, ditch or watercourse to which lateral ditches could be connected for the purposes contemplated by the statute. The statute authorizes a recovery as for a failure to observe its obligation, only when the railroad company fails to construct or maintain lateral ditches "to connect with ditches, drains or watercourses" which may afford an outlet to drain and carry off the water. Therefore, the jury must be required to find that such ditches, drains or watercourses are present with which a connection by lateral ditches may be made, for without them no obligation is imposed to construct or maintain such lateral ditches. [Ranney v. St. Louis & S. F. R. Co., 137 Mo. App. 537, 119 S. W. 484.] In the instant case it is not abundantly clear that there was a sufficient ditch, drain or watercourse with which the lateral ditches could be connected and the question is highly material on the evidence. However, there is substantial evidence tending to prove this fact, but the jury should be required by the instruction to find it to be true. The instruction omits, too, to require a finding that the draining of the water had been obstructed or rendered necessary by the construction of

Digitized by Google

the railroad, while the statute under consideration imposes one of these as an essential element of the right to redress.

Furthermore the instruction is erroneous in respect of the measure of damages it prescribes. That portion of the instruction italicized would permit a recovery quite beyond any rule of damage with which we are familiar. It is unnecessary to comment upon it further than to say that the error it reveals is manifest. The true measure of damages in the case here for the loss of growing crops is the value of the crops destroyed standing in the field at the time they were destroyed. The rule is well settled. [See Hunt v. St. Louis, I. M., etc., R. Co., 126 Mo. App. 261, 103 S. W. 133; Anderson v. St. Louis, I. M., etc., R. Co., 129 Mo. App. 384, 108 S. W. 605; Deal v. St. Louis, I. M., etc., R. Co., 144 Mo. App. 684, 129 S. W. 50.] However, in determining the value of a growing crop, which is always a difficult matter, it is competent, in an action for damages for its destruction, to give evidence of the yield of a similar crop on similar land under similar conditions and the market value of the crop in the autumn when matured in connection with evidence of the cost of planting, cultivating, gathering and marketing the same. From such data it is said the jury is enabled to ascertain, with reasonable certainty, the amount of the loss at the time it was suffered while the crop was yet growing in the field. [See Hunt v. St. Louis, I. M., etc., R. Co., 126 Mo. App. 261, 103 S. W. 133.]

Because of the errors pointed out in plaintiffs' instruction, the judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

Digitized by Google

WESTMINISTER LAUNDRY COMPANY, Respondent, v. HESSE ENVELOPE COMPANY, Appellant.

St. Louis Court of Appeals, May 6, 1913.

1. **TRADE-MARKS AND TRADE-NAMES: Infringement of Trade-Mark.** The infringement of a trade-mark consists of the unauthorized use or colorable imitation of it upon substituted goods of the same class as those for which the mark has been appropriated.

2. ———: ———. It is essential to the existence of a right of action for infringement of a trade-mark that the plaintiff have an exclusive proprietary right in it and that it had been in actual use as a means of identifying the origin, ownership or manufacture of the goods of its proprietor, and had been annexed to, and accompanied, the goods to market.

3. ———: **Unfair competition.** Unfair competition consists of passing or attempting to pass upon the public the goods or business of one person as that of another.

4. ———: ———: **"Blind Advertising."** It is not, in every instance, a condition precedent to the right to maintain an action for unfair competition by the use of a word or phrase that the complainant have a proprietary right in such word or phrase, but it is a condition precedent to the exercise of such right that the complainant shall have used such word or phrase in his business, as a means of identifying his product, for a sufficient length of time to establish a repute therefor in the market; and hence, where an advertising agency had contracted with plaintiff laundry company to run a "blind" advertisement for it, by first printing the word "stopurkicken" on billboards and cards, without printing plaintiff's name, until the public's curiosity was aroused, when plaintiff's name was to follow in connection therewith, defendant envelope company's use of the word, before plaintiff's name had been printed in connection therewith, was not unfair competition.

5. ———: **Assignability of Trade-Name: Appropriation of Words in Common Use.** One who has acquired a right to use a word or phrase in connection with his product, under such conditions as would entitle him to protection against the use thereof by another, on the ground of unfair competition, may assign such right, in conjunction with the good will of the

Digitized by Google

product which such word or phrase identifies; but an advertising agent may not appropriate any word or phrase he chooses and confer on another an exclusive right to use the same by a contract to use it in aid of his business.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher,* Judge.

REVERSED.

Morton Jourdan and *George T. Priest* for appellant.

Plaintiff's petition does not state facts sufficient to constitute a cause of action against defendant. The petition does not allege any exclusive proprietary interest in plaintiff of the phrase "Stopurkicken." Reach Co. v. Hardware Co., 155 Mo. App. 412; Asphalt Co. v. Paint Co., 163 Fed. 977.

Percy Werner, Hugh K. Wagner and *Edward D'Arcy* for respondent.

NORTONI, J.—This is a suit for damages, in which plaintiff recovered a verdict for one dollar. On this verdict, judgment was given, and defendant prosecutes an appeal therefrom.

All of the relevant facts appear from the face of the petition, and the question of liability is to be determined thereon. It appears that the plaintiff, the defendant and the D'Arcy Advertising Company are each corporations engaged in their respective callings in the city of St. Louis. Plaintiff owns and is engaged in the business of operating a steam laundry. Defendant is engaged in the business of manufacturing envelopes. The D'Arcy Advertising Company is engaged in the advertising business—that is to say, it places advertisement in St. Louis for those who choose to patronize it. The plaintiff laundry company engaged the D'Arcy Advertising Company to do certain

Digitized by Google

advertising for it by running what is known as a "blind" advertisement. Such "blind" advertisement is described in the petition as follows:

"The fundamental idea of same (the 'blind' advertisement) being the use of some striking device well adapted to attract public attention, but unaccompanied, upon its first appearance, by the name of the advertiser using it, other matter, being added later and the name of the advertiser, also, being given when the curiosity of the public had been sufficiently piqued and the attention of the public has been excited by the 'blind' nature of the advertisement."

The striking device referred to in the quotation from the petition and that contemplated in the instant case is the word "Stopurkicken." The petition avers that plaintiff entered into a contract with the D'Arcy Advertising Company whereby it was to have the exclusive use of the word "Stopurkicken;" that the D'Arcy Advertising Company, in pursuance of plaintiff's plan, had the word "Stopurkicken" published upon signboards and by way of printed cards. After the word "Stopurkicken" had been so used and before plaintiff had time to determine upon a proper supplement to such advertisement to disclose its own name and identity, the defendant, Hesse Envelope Company, well knowing the word "Stopurkicken" was being used in the manner mentioned and desiring to take advantage of the word "Stopurkicken," as above described, printed and distributed throughout the city of St. Louis a large number of cards bearing the word "Stopurkicken" and followed by the name of the Hesse Envelope Company. Because this use of the word by defendant, Hesse Envelope Company, plaintiff avers it is damaged and prays a recovery therefor.

It is said the word "Stopurkicken" is an attractive misspelling and contraction of the phrase "Stop your kicking," designed to excite public curiosity. It is obvious the petition states no cause of action against

Digitized by Google

defendant unless the word "Stopurkicken" is either a trade-mark in which plaintiff enjoys a proprietary right, or is possessed of a secondary meaning, which, by user, has become a part of the good will of plaintiff's business, otherwise the word is *publici juris* and available to every person desiring to employ it identically as is the original phrase of which it is a contraction. (From the affirmative averments of the petition, it is entirely clear plaintiff enjoyed no trade-mark in the word under consideration.) Indeed, the cause does not proceed upon that theory. Plaintiff is engaged in the laundry business, which, of course, is that of washing and ironing for others. There is no suggestion in the petition that the word "Stopurkicken" was in any manner annexed to plaintiff's wares or the output of its laundry. Infringement of a trade-mark consists in the unauthorized use or colorable imitation of it upon substituted goods of the same class as those for which the mark has been appropriated. [38 Cyc. 741.] The petition reveals that plaintiff had not yet employed the word in any manner so as to identify it with its business, for it says, though a contract had been entered into between plaintiff and the D'Arcy Advertising Company for the use of the word and it had been employed in blank space on signboards and on cards, plaintiff had not yet revealed its identity in connection therewith. Defendant is engaged in the manufacture and sale of envelopes and used the word on an advertising card followed immediately by the name Hesse Envelope Company. These facts appearing as they do in the petition, sufficiently disclose that no proprietary right as in trade-mark existed in the plaintiff in respect of the word "Stopurkicken." Not only must an exclusive proprietary right appear in the trade-mark but the actual use of the trade-mark is essential as a means of identifying the origin, ownership or manufacture

Digitized by Google

of the goods of its proprietor, and, furthermore, such trade-mark must be annexed to and accompany the goods into the market to the end of their identification. [See Grocers Journal Co. v. Midland Publishing Co., 127 Mo. App. 356, 366, 105 S. W. 310; 38 Cyc. 691, 693.] Unless the word or insignia relied upon is in some manner attached or affixed to the article in trade or stamped or inscribed thereon, it is not a trade-mark and the maker of such article is without trade-mark rights concerning it. [See Oakes v. St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467; St. Louis Piano Mfg. Co. v. Merkel, 1 Mo. App. 305.] It is entirely clear that defendant, in using the word "Stopurkicken" in connection with advertising its envelopes, was not infringing upon plaintiff's laundry business, for the wares or commodities of the two companies are entirely dissimilar. But aside from this, it appears affirmatively that the plaintiff had never used the word in connection with the output of its laundry. It had, therefore, obtained no proprietary right thereto by continued use through affixing it to the workmanship of its laundry turned out into the market.

For the same reasons, in part at least, no secondary right to the use of the phrase appears in plaintiff by user such as is essential to render it a portion of the good will of its laundry business as if reputation obtained thereon. It is certain that the case may not be sustained as one for unfair competition. Unfair competition consists in passing off or attempting to pass off upon the public the goods or business of one person as and for the goods or business of another. [See Cyc. 756.] Nothing less than conduct tending to pass off one man's goods or business as that of another will constitute unfair competition, for such is the very essence of the wrong on which the law affords redress to the injured party. [See Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665, 674, 21 S. Ct. 270,

Digitized by Google

45 L. Ed. 365; 38 Cyc. 762, 763; 38 Cyc. 758; see, also, Grocers Journal Co. v. Midland Pub. Co., 127 Mo. App. 356, 367, 105 S. W. 310.] The relief, in cases of unfair competition, proceeds upon the theory that the words or phrase employed as by long use in connection with the goods or business of a particular trade come to be understood by the public as designating the goods or business of that particular trader. Because of such user, the word or phrase becomes identified with the business of him who employs it and constitutes a part of its good will. Such meaning of the words or phrase, it is said, is the genesis of the law of unfair competition as distinguished from technical trademark, and, therefore, relief against unfair competition is afforded upon the ground that one who has built up a good will and reputation for his goods or business under a particular designation is entitled to the benefits therefrom. And secondary to this, the theory is that the deception of the public injures the proprietor of the business by diverting his customers and filching his trade. [Grocers Journal Co. v. Midland Pub. Co., 127 Mo. App. 356, 367, 105 S. W. 310; 38 Cyc. 760, 761, 763, 769.]

It is to be observed that, though the right to complain as for unfair competition does not in every instance require that the complainant shall have a proprietary right in the phrase, it does require that he shall have used it in his business as a means of identifying his goods as his product and for a sufficient length of time to establish a repute therefor in the market as pointing his product. [Grocers Journal Co. v. Midland Pub. Co., 127 Mo. App. 356, 367, 105 S. W. 310; Reach Co. v. Simmons Hardware Co., 155 Mo. App. 412, 135 S. W. 503; 38 Cyc. 769, 763.] Unless the word or phrase involved has become a parcel of the good will of his business by continued user in connection with the product of the proprietor, it is entirely clear that the use of the same word by another

Digitized by Google

does not reveal an unfair competition. [Shelley v. Spelry, 121 Mo. App. 429, 99 S. W. 488.]

The petition shows on its face that plaintiff had never used the word "Stopurkicken" in connection with the output of its laundry, but on the contrary only employed it on billboards and cards otherwise blank, as an attraction to arouse the curiosity of the public with a view of revealing the name of the advertiser (plaintiff) thereafter. It is clear enough that, though defendant interposed and used the same word on cards bearing its name, as it did, no unfair competition appears when considered in the sense of the law on the subject and until plaintiff had obtained a right thereto by actual user in connection with the product of its laundry, the phrase "Stopurkicken" must be regarded as *publici juris* and available to all who desired to employ it identically as was the original phrase "Stop your kicking." It is certain the D'Arcy Advertising Company had no superior right to either the phrase or the contracted word and that it could confer none upon plaintiff by its contract to employ it as a means of arousing the curiosity of the public for plaintiff's benefit. [Reach v. Simmons Hardware Co., 155 Mo. App. 412, 135 S. W. 503.] Though persons who have acquired a right in respect of words and phrases by user as above indicated, may assign or contract such right to another in conjunction with the good will of the commodity, the identity of which they point, it is obvious that an advertising agent may not appropriate any word or phrase he chooses, by merely selecting it out of our vocabulary, and confer an exclusive right thereto on another by a contract to employ it in aid of his business. We are advised of no principle of our jurisprudence on which the judgment in this case may be sustained, and the counsel for plaintiff have omitted to file a brief suggesting one. The judgment should be reversed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

Digitized by Google

ANNA ERDMANN, Respondent, v. UNITED RAILWAYS COMPANY of St. Louis, Appellant.

St. Louis Court of Appeals. Argued and Submitted April 9, 913. Opinion Filed May 6, 1913.

1. **DAMAGES: Personal Injuries: Instructions: Failure to Limit Recovery.** In an action for personal injuries, it is not reversible error for the instruction on the measure of damages to fail to limit the recovery on the different items of damages to the amount demanded therefor in the petition.

2. **WITNESSES: Privileged Communications: Attorney and Client.** In an action for personal injuries, counsel for defendant undertook to have plaintiff testify, on cross-examination, as to the information upon which she relied when she advised her counsel concerning the injuries she alleged she had sustained. As interpreted by the trial court, the question called for testimony concerning the statements made by plaintiff to her counsel concerning her injuries. On objection by counsel for plaintiff that the question called for a privileged communication between attorney and client, the question was excluded as being improper in the form asked. *Held*, that this ruling was correct.

3. **DAMAGES: Action for Personal Injuries: Evidence.** Where, in an action for personal injuries, plaintiff's condition and the extent of her injuries were fully proved by the evidence of herself and her physicians, whether she knew of the extent of her injuries when she brought the action, or was acting on her own knowledge or on information given by her physicians when she consulted counsel, was immaterial.

W. B. Homer, Judge.

Appeal from St. Louis City Circuit Court.—*Hon.* AFFIRMED.

Boyle & Priest and *Paul U. Farley* for appellant.

(1) The court erred in giving plaintiff's instruction No. 2, in that said instruction fails to limit the amount of plaintiff's recovery for medical attendance and medicine to the sum pleaded in her petition, to-

Digitized by Google

wit, $100. Smoot v. Kansas City, 194 Mo. 513; Heinz v. Railroad, 143 Mo. App. 38; Shinn v. Railroad, 146 Mo. App. 718; Tinkle v. Railroad, 212 Mo. 471; Radke v. Basket & Box Co., 229 Mo. 1; Walters v. Railroad, 165 Mo. App. 628. (2) The court erred in excluding competent, material and relevant testimony offered by defendant.

C. J. Anderson for respondent.

(1) None of the authorities cited by appellant under point I of its brief are applicable to the case at bar for the reason that in each of those cases the petition expressly limited the full amount of damages sustained by plaintiff by reason of such medicines and medical attendance or loss of time. (2) Instruction number two on the measure of damages as given for plaintiff correctly states the law. Lindsay v. Kansas City, 195 Mo. 166; Tandy v. Transit Co., 178 Mo. 240; O'Donnel v. United Railways Co., 152 Mo. App. 606. (3) No error was committed by the trial court in its ruling on the evidence offered by the defendant and complained of by defendant herein. If such ruling was erroneous then such error was harmless and in no way prejudicial to the defendant. The court sustained the objection to the form of the question only. If counsel had desired to pursue the subject-matter further he could have reframed his question.

REYNOLDS, P. J.—The petition in this case counts upon injuries alleged to have been sustained by plaintiff in consequence of a collision between two cars operated by defendant, one on its Cherokee line, the other on its Olive street line, in the city of St. Louis. The injuries alleged to have been sustained are bruises, contusions and abrasions upon the nose, arms and lower limbs, the left shoulder badly sprained, back sprained and wrenched, the left ear torn and lac-

Digitized by Google

erated, ovaries and kidneys torn, bruised and lacerated and entire nervous system greatly shocked, it being alleged that her injuries are incurable and permanent. It is charged that by reason of her injuries plaintiff has been prevented from following her usual occupation as a saleslady of millinery and ladies' wearing apparel; that she has lost her earnings from that employment, to-wit, $15 a week from and after the 4th of June, 1910, and will continue to lose those earnings in the future; that she has paid large sums of money for medicine and medical treatment, in the amount of $100, has obligated herself to pay and will be compelled to pay large sums of money for medicines and medical treatment in the future, the amount unknown to plaintiff. Damages were prayed in the sum of $7500.

The answer was a general denial. The trial resulted in a verdict and judgment for plaintiff in the sum of $3750, from which, after filing a motion for new trial, defendant has duly perfected its appeal to this court.

The only errors assigned before us are two. The first is to the giving of an instruction as to the measure of damages, it being complained that this instruction fails to limit the amount of plaintiff's recovery for medical attendance and medicines to the sum pleaded in her petition, to-wit, $100. In support of this assignment we are referred to Smoot v. Kansas City, 194 Mo. 513, 92 S. W. 363; Heinz v. United Railways Co., 143 Mo. App. 38, 122 S. W. 346; Shinn v. United Railways Co., 146 Mo. App. 718, 125 S. W. 782; Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 S. W. 1086; Radtke v. St. Louis Basket & Box Co., 229 Mo. 1, 129 S. W. 508, and Walters v. United Railways Co., 165 Mo. App. 628, 147 S. W. 1098. It is true that the instruction complained of did not limit the amount of recovery for medical attendance and medicine to the sum pleaded, to-wit, $100, and that these

Digitized by Google

cases seem to hold that this was error. But in the recent case of Shinn v. United Railways Co., not yet officially reported but see 154 S. W. 103, where the same point was made on the instructions and in which the majority of our court held in the same case (146 Mo. App. 718) that the instruction should have limited the recovery for medical attendance to the amount claimed, our Supreme Court has disapproved of that, holding that it was unnecessary, in the instructions, to place a limit upon each specific item of damage alleged to have been sustained. On the authority of that decision this assignment of error must be overruled.

The second and remaining assignment of error is to the exclusion of competent, material and relevant testimony, as it is said, offered by defendant. In the cross-examination of plaintiff, counsel for defendant undertook to have her testify as to the information upon which she relied when she advised her counsel of the injuries which she alleged she had sustained, or, as the question was interpreted by the court, counsel for defendant undertook to ask plaintiff what statement she had made to her counsel as to that matter. This was objected to as privileged communication between attorney and client and as immaterial. After some discussion between court and counsel the court ruled that the question was improper in the form asked. To this counsel excepted. Plaintiff was then asked by counsel for defendant if, at the time she went to see her attorney and gave him the facts on which he drew up the petition which he filed, she knew she was suffering from the injuries which she had testified to in the suit. This was objected to as immaterial and objection overruled. Witness answered that she did. She was then asked if she knew what her injuries were at that time. She answered that "of course" she did. She further stated that when she called on her attorney to give him the facts in the case that he might draw up her petition, she had told him what was

Digitized by Google

the matter with her. She further said that at that time she had not seen one of the physicians who afterwards attended her. She had seen another physician who, it appears, testified that he was unable to find anything more serious than bruises. Hence it is argued by counsel for appellant that it became a very interesting and pertinent question as to in what manner plaintiff learned that her ovaries and kidneys were torn, bruised and lacerated, and was able to advise her counsel thereof before she had been told by one of her physicians who had testified to her injuries. It is claimed that this went to the credibility of the witness. We do not think this objection tenable. The only objection sustained was as to the form of the question. That ruling was correct. Following that, counsel for defendant was allowed practically to go into the matter with the plaintiff, so that we are unable to see the force of the argument now made. So far as concerns the credibility of the plaintiff as a witness, that was for the jury. This witness and the physicians testified as to the injuries. Whether plaintiff knew of their extent when she brought her action, or was acting on her own knowledge or on information given by her physicians when she consulted counsel was entirely immaterial.

There was testimony tending to sustain the allegations of the petition, the case was one for the jury under proper instructions, no complaint of any instruction save the one referred to as to damages is made, and we find no reversible error.

The judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

Digitized by Google

MARY MITCHELL, Appellant, v. CHARLES B. GREELY et al., Respondents.

St. Louis Court of Appeals. Argued and Submitted April 8, 1913. Opinion Filed May 6, 1913.

1. **APPELLATE PRACTICE: Attachment: Orders Before Final Judgment: Appealability.** An order revoking an order of sale of attached goods and setting aside a sale thereunder is not appealable, prior to final judgment; but such an order may be reviewed, on an appeal by plaintiff after final judgment, even though such judgment be in his favor.

2. **TRIAL PRACTICE: Attachment: Setting Aside Order of Sale: Jurisdiction.** A motion to revoke an order of sale of attached goods and to set aside a sale thereunder, filed at the term during which the order was made and continued to the next term, may be acted upon at the next term.

3. **ATTACHMENT: Setting Aside Order of Sale.** The trial court has authority to revoke an order of sale of attached goods and to set aside a sale thereunder, especially where the plaintiff is the purchaser and the rights of third persons have not intervened.

4. ———: ———: **Evidence: Suppression of Evidence.** Where the plaintiff in an attachment suit prevented an inspection of the property attached, he was in no position to urge, on appeal, that, because there was no definite evidence of the value of such property, the court was not authorized to revoke the order of sale of such property and set aside the sale thereunder on the ground that the property was sacrificed.

5. ———: ———: **Sufficiency of Evidence.** Evidence adduced in support of a motion to revoke an order of sale of attached goods and to set aside the sale thereunder, relating to the conduct of the sale by the sheriff and the failure to give sufficient notice thereof, *held* to show such an abuse of the process of the court as to warrant the sustaining of the motion.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields,* Judge.

AFFIRMED.

Digitized by Google

Thomas Bond for appellant.

(1) An appeal may be taken from any final order, either at the time or after final judgment has been entered. R. S. 1909, sec. 2038; Padgett v. Smith, 206 Mo. 331. (2) The order setting aside the sale was a final judgment as to the matter decided, and appellant was aggrieved thereby. R. S. 1909, sec. 2038; State ex rel. v. Bland, 197 Mo. 197, 215. (3) This was an execution or sheriff's sale, and not a judicial sale; and, being executed, the court had no power to set it aside. R. S. 1909, sec. 2320; 17 Am. & Eng. Ency. of Law (2 Ed.), p. 956; Noland v. Barrett, 122 Mo. 189, 190; Young v. Kellar, 94 Mo. 592; Plow Works v. Iron Works, 56 Mo. App. 1; Tomey v. Baxter, 59 Mo. App. 470; State v. King, 45 La Ann. 1421. (4) Even if the trial court had power to set aside this sale, which we deny, yet, under the evidence, such power ought not to have been exercised. R. S. 1909, sec. 2208; Testimony of Thomas B. Kilcullen; Testimony of George W. Kerr.

Johnson, Rutledge & Lashly for respondents.

(1) This court has no jurisdiction of this appeal. (a) An appeal cannot be taken from an order setting aside for irregularity a sheriff's sale of attached perishable property, which is made at a term prior to the trial on the merits and final judgment. Crossland v. Admire, 118 Mo. 87; Sec. 2038, R. S. 1909. (b) An interlocutory order made prior to final judgment with reference to a matter in no way affecting the merits of the case and having no reference to the issues in the pleadings cannot be appealed from. (c) The judgment was in favor of appellant for the full amount. It is not as judgment plaintiff she appeals, but as purchaser at the sheriff's sale; for such purchaser acquires only an incipient right which may develop into a perfect right if it is not set aside by the court. Thomas

Digitized by Google

v. Elliott, 215 Mo. 598. (2) The court had full power to set aside the sale. (a) As sales of perishable property seized by the sheriff can, under the statute, be made only on an order of the court, and as a return of the proceedings of the sale must be made by the sheriff, it is clear that the court which made the order and to which the report of the sale must be made has complete power over its process and has power to set aside or recall such sale, as well as its order of sale. Sec. 2320, R. S. 1909; Oeters v. Aehle, 31 Mo. 380; Young v. Keller, 94 Mo. 598; Aurora v. Lindsay, 146 Mo. 509; Frank v. Eby, 50 Mo. App. 579; Grover v. Smith, 49 Mo. 318. (b) Such a sale is for the mere purpose of conserving the attached property and to change its perishable form into cash, to abide the result of the controversy. In this respect it differs from an execution sale where the writ is subject to the control of the plaintiff. Here the court is acting by its inherent and statutory power in the interest of all concerned, and the proceeding is in the nature of one *in rem*. City v. Brooks, 107 Mo. 380; Aurora v. Lindsay, 146 Mo. 509; McKee v. Logan, 82 Mo. 524; Wine Co. v. Schuler, 13 Mo. App. 345; 85 Mo. 496. (c) An interlocutory order or decree made in the progress of a case is always under the control of the court before final judgment and may be set aside on motion. Collier v. Lead Co., 208 Mo. 246, at 275; Black on Judgments, sec. 308; 15 Cyc. 349; Wine Co. v. Schuler, 85 Mo. 496. (3) The sale was unfair to respondents and worked a great injustice upon them because of the situation of the property and the character of the notice. (a) The sale was made on an *ex parte* application and without notice to respondents of the application or sale was sold at a sacrifice. (b) In sales by the sheriff, such a description must be given of the property as will notify the bidders with certainty of the property to be sold. State ex rel. v. Keeler, 49 Mo. 546, at 551; Davis v. McCann, 143 Mo. 172, at 178.

Digitized by Google

(c) Where property which is susceptible of being sold in division is sold in bulk, the court, on timely motion, will set aside the sale, particularly where the price was inadequate. Hicks v. Perry, 7 Mo. 346; Rector v. Hart, 8 Mo. 448; Kelly v. Hunt, 61 Mo. 463; Gordon v. O'Neil, 96 Mo. 350; State ex rel. v. Yancey, 61 Mo. 397; Wine Co. v. Schuler, 85 Mo. 496.

REYNOLDS, P. J.—This action was brought to recover $1794.13, alleged to be due plaintiff by the defendants, the amount being a balance claimed to be due on a note which was secured by certain real estate, to satisfy which debt the real estate was sold under the provisions of the deed of trust and the property bought in by plaintiff, leaving a balance due on the note and for costs and expenses of the sale in the above mentioned amount. An attachment was sued out in aid of the action, defendants being nonresidents. Under the writ of attachment the household goods, still situated in the premises which had been covered by the deed of trust, and which was bought in by plaintiff, were attached and levied upon, these household goods having been left in the house and in charge of plaintiff by the sheriff after he had seized them under the writ of attachment. The sheriff in his return to the writ of attachment described the goods which he had seized and taken into custody with great particularity, describing the various articles which were in the several rooms, this description covering about three pages of the printed abstract. The attachment was levied on the 27th of July, 1911, the cause returnable to the October term of the court.

On the 12th of September, 1911, and during the June, 1911, term of the court, the sheriff, without giving notice to defendants or their attorneys, went before a judge of another division of the court, the division to which the cause was assigned not then being in session, and presented to that judge an application

Digitized by Google

for a sale of the property attached, on the ground stated that the goods were perishable and that it would be only at great cost that they could be stored or guarded. The order of sale was granted, the sale to be held on the 23d of September. On September 11th, and acting under this order, the sheriff caused to be printed a number of handbills which, after setting out the order of sale, described the property in this way:

"A miscellaneous lot of household goods, furniture, bric-a-brac, chandeliers, mirrors, statuary, carpets, bookcases, dressers, washstands, pictures, rugs, oilcloth, chiffoniers, folding beds, screens, curtains, curtain poles, tables, easels, chairs, jardinieres, lamps, wastebaskets, footstools, clocks, garden benches, china closets, glassware, chinaware, bedding, pillows, mattresses, etc., and one pipe organ."

The sheriff's deputy testified that he had distributed a number of these handbills and had set up three of them in and about the courthouse of the city, none, however, as appears, being posted at the house in which the property was contained nor in its immediate vicinage. On the day of and during the sale, and apparently for some time prior thereto, the house in which the goods were situated was closed, the main entrance boarded up, and an unknown man, and the deputy sheriff, an agent for the plaintiff, and an attorney for the plaintiff, on the day of the sale, that is the 23rd of September, without opening the front or main door, entered by a back door and the sheriff cried off the sale in the house, there being present other than plaintiff's attorney, only an agent of plaintiff and the deputy sheriff, as well as this unknown and unidentified person, a person, so far as the evidence shows, unknown to the sheriff's deputy or to the attorney or to the agent of plaintiff. This unknown person bid the property up to $1300, and plaintiff bidding $1350, the property was knocked down to her at that price as the highest and last bidder. She gave a check to the sheriff

Digitized by Google

for the amount of the bid and the parties appear to have left the premises, the sheriff, testifying that he had turned the property still in the house, its situation and condition unchanged, over to the agent of plaintiff then and there present. The defendants had no notice of the intended sale and were not represented at it.

The attorneys for the defendants heard of the sale the evening of that day, Saturday, and after the sale, and at once notified the sheriff that that they would appear in court on the Monday following and move the court to vacate the order and set aside the sale. On that Monday and during the same June term of the court, the attorneys for defendants, as well as for plaintiff, appeared in court and the former presented their motion to set aside the sale and to quash and recall the order theretofore entered in the cause authorizing and directing the sheriff to sell the property. This motion sets out that none of the property was perishable nor likely to greatly depreciate in value; that the goods were shut up and inclosed in the premises, which had been locked and kept closed by the sheriff and not accessible to the public or prospective purchasers; that no opportunity for inspection was given to the public or possible purchasers; that no newspaper advertisements were published advising prospective or possible purchasers of the time and place or pendency of the proposed sale or of the nature of the property to be sold; that no notice of the proposed sale was posted in, upon or about the premises where the goods were being kept prior to the sale and where they were proposed to be sold, nor within the ward or neighborhood within which the property was situated; that on the day and at the time of the sale no flag or other sign of sale was hung out; that the application for the order of sale and the conduct of the sale and the fact of the proposed sale and the sale itself were all without the notice or knowledge of

Digitized by Google

the defendants or either of them, who had no opportunity to be heard with respect thereto; that the sale was attended by no persons save plaintiff, plaintiff's counsel and one or two other persons there brought by plaintiff; that under the circumstances the sale should not have been held at that time; that under the discretion vested in the officer it should have been continued to a more opportune time and some public notice given; that the property was of the reasonable value in excess of $4000 and that the price obtained at the attempted sale is so low as to constitute under the circumstances gross inadequacy and so unfair, unjust and inequitable as to call upon the conscience of the court to set aside the sale; that it was sold in bulk and for a lump price, whereas it should have been sold by the piece or by lots; that the defendants had retained counsel to defend the suit in the attachment proceedings and intended at the return term, which had not yet arrived, to take the necessary proceedings to defend the suit.

The court heard testimony in regard to this and it may be said that all of the facts stated herein were proved with the exception of the value of the property. As to that it was in evidence that the attorneys for the defendants had endeavored to obtain permission for plaintiff's attorney to inspect the property and have persons competent to appraise it view it with the object of arriving at its value but that the counsel for the plaintiff had refused them access to it and refused to allow them to have it inspected by any parties and refused them entrance to the building in which it was contained. During the trial, the judge remarked that "it certainly would be unconscionable to allow plaintiff to get $4500 worth of goods for $1350, on an *ex parte* proceeding." But there was no evidence, as said, as to the value of the goods, for the reason above stated. At the conclusion of the testimony the circuit judge who heard the cause, he being the judge presiding over

Digitized by Google

the division to which the cause was regularly assigned but a judge other than the one who had issued the order for the sale, after hearing the evidence and taking the cause under advisement, ordered, at the succeeding October term, that the motion to set aside the sale be sustained and that the sale be set aside and vacated and the order of sale be recalled and quashed and that the sheriff, who, in the meantime had retained the check given by plaintiff in payment of the bid which she had made, return the check to plaintiff, and that the sheriff retain the property under his levy in the attachment. This order was duly excepted to at the time by the plaintiff who tendered her term bill of exceptions, which was duly signed and made of the record in the cause at that term. Afterwards, at this October term of the court, the term to which the cause was returnable, defendants appearing specially, filed their plea in abatement of the attachment. The cause was set for hearing and the issues found for the plaintiff, and a judgment entered sustaining the attachment. Afterwards at the December term of court, defendants entered their general appearance in the cause and filed a confession of judgment, on which confession final judgment was rendered in favor of the plaintiff. Whereupon the plaintiff filing a motion for new trial particularly attacking the action of the court in setting aside the order of sale, duly perfected her appeal to this court.

It is urged by counsel for the respondents that no appeal lies here by the plaintiff as the order setting aside the sale was not a final order or judgment. We cannot agree to this proposition. The order of the court setting aside the order of sale and revoking the order which it had made for the sale, it is true, was not such an order or final judgment from which an appeal would lie, until a final judgment was entered. Appeals are regulated by section 2038, Revised Statutes

Digitized by Google

1909, and while that section provides for appeals from final judgments and from interlocutory or other than final judgments in certain excepted cases, of which this is not one, it is expressly provided by this section, that "a failure to appeal from any action or decision of the court before final judgment shall not prejudice the right of the parties so failing to have the action of the trial court reviewed on an appeal taken from the final judgment in the case." As we understand this section and the practice, plaintiff was within her rights, although final judgment was rendered in her favor, when she took an appeal after final judgment which would bring under consideration in the appellate court the action of the trial court in setting aside that order of sale and setting aside that sale.

Taking up the appeal on its merits, we are of the opinion that the order made on the 11th of October, 1911, to which term of the court the motion to vacate had been continued, vacating the order of sale and setting aside the sale, the motion to vacate made at the same term at which the order was entered, was entirely within the power of that court. We see no reason to make any exception as to an order of this kind or why it should be taken out of the general rule, which provides that all orders of the court made during the term are subject to the control of the court during that term. It was an order made at the October term, but on a motion made at the June term, and, as held in numerous cases, was subject to the control of the court during that term. Even treating it as an interlocutory judgment, it is said by our Supreme Court in Collier v. Catherine Lead Co., 208 Mo. 246, l. c. 275, 106 S. W. 971 (quoting Black on Judgments, sec. 308):

"An interlocutory judgment or decree, made in the progress of a cause, is always under the control of the court until the final decision of the suit, and it may be modified or rescinded upon sufficient grounds

Digitized by Google

shown, at any time before final judgment, though it be after the term in which the interlocutory sentence was given."

Counsel for appellant refers us to Young v. Kellar, 94 Mo. 581, 7 S. W. 293, and Noland v. Barrett, 122 Mo. 181, 26 S. W. 692, as authority for the proposition that this sale, said not to be a judicial one but made ministerially by the sheriff, like a sale under execution, is not subject to the approval of the court, and that the sale of the property by the sheriff under such an order carries absolute title to the purchaser. We do not understand that either of these cases go to the extent claimed by counsel. It has been held in many cases that sales under execution can be set aside by the court from which the execution issued and that orders for sales may be vacated. [See Rogers & Baldwin Hardware Co. v. Cleveland Building Co., 132 Mo. 442, l. c. 454, 34 S. W. 57; State ex rel. v. Innes, 137 Mo. App. 420, l. c. 424, 118 S. W. 1168.] As before said, we see no reason why an order of this kind is any less subject to the control of the court for annulment, vacation or amendment at any time during the term by that court, as was the case here, than in any other order, even judgment. This property here claimed to have been held by the sheriff was surely in the custody of the court, and whether it had to approve the sale of it or not, until the court let go of it, it was *in custodia legis*. Ultimately it was bought in by the plaintiff herself and the rights of no third parties intervened.

The evidence in the case was entirely satisfactory to the circuit court that there had been a sacrifice of the property, although it is true that no definite figure as to its value was before the court. As appears, however, this was occasioned by the acts of plaintiff and her counsel in preventing an inspection of the property for the purpose of arriving at its true value. It does not lie in the mouth of plaintiff, therefore, to

Digitized by Google

make any complaint of a lack of evidence as to value, which evidence she had herself prevented.

The evidence before the court as to the conduct of the sale, no notice whatever or sign or indication that a sale was to take place in these premises being affixed to or anywhere near the premises in which the sale was to take place; the building not open to the public at the time of the sale; entrance to it procured, not through the front door and usual entrance which was boarded up but through a back door or a side entrance; no bidders there except one outsider, who was unknown to any of the parties and whose name or identity was not disclosed at the trial of the cause before the court, show such an abuse of the process of the court as to fully warrant it in vacating the order and setting aside the sale. The rights of no third party have intervened, even if that would prevent action, as to which we express no opinion, so that we think it was entirely within the power as well as the duty of the court, to take the action which it did. We see no error in that action and it is affirmed. *Nortoni, J.*, concurs. *Allen, J.*, not sitting.

WILLIAM ARTHUR DAY et al., Respondents, v. SUPREME FOREST, WOODMEN CIRCLE, Appellant.

St. Louis Court of Appeals. Argued and Submitted April 7, 1913. Opinion Filed May 6, 1913.

1. **FRATERNAL BENEFICIARY ASSOCIATIONS: Failure to Pay Assessment: Forfeiture of Certificate.** Under a by-law of a fraternal beneficiary association, providing that if a member failed to pay a monthly assessment on or before the last day of the month, he should stand suspended and the certificate should be void, the failure of a member to pay an assessment on or before the last day of the month would *ipso facto* effect a forfeiture of all rights under his certificate.

Digitized by Google

2. **CONTRACTS: Forfeitures.** Although forfeitures are not favored, yet when a contract is a lawful one, is fairly made, and provides for a forfeiture, a forfeiture will be enforced.

3. **FRATERNAL BENEFICIARY ASSOCIATIONS: Members' Knowledge of By-Laws: Presumptions.** A member of a fraternal beneficiary association is conclusively presumed to know the provisions of its constitution and by-laws.

4. **———: Forfeiture for Nonpayment of Assessment: Waiver.** Where the clerk of a subordinate lodge of a fraternal beneficiary association accepted payments of a past-due assessment from the husband of a member who had been suspended for nonpayment of such assessment, on his statement that his wife was "all right," when, in fact, she was suffering from an illness from which she shortly thereafter died, and the supreme governing body of the association had no knowledge of the clerk's action, such action was not a waiver by the association of the provisions of a by-law, requiring, as a condition precedent to reinstatement after suspension for nonpayment of an assessment, that the member personally appear and apply for reinstatement within a stipulated time, or send to the clerk a written statement on an official form furnished by the association, to the effect that he or she is in good health.

5. **———: Action on Certificate: Forfeiture for Nonpayment of Assessment.** In an action on a certificate issued by a fraternal beneficiary association, *held* that insured was automatically suspended, under the constitution and by-laws of the order, for nonpayment of an assessment, and that she was not reinstated by virtue of an unauthorized acceptance, by the clerk of the subordinate lodge to which she belonged, of the past-due assessment, and that such acceptance was not a waiver of the provisions of the by-laws prescribing a different mode of procedure for reinstatement, inasmuch as the supreme governing body of the order had no knowledge thereof; and hence it is *held* that a recovery could not be had on the certificate.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields,* Judge.

Phil. H. Sheridan, Henry B. Davis and *Charles Erd* for appellant.

REVERSED.

Digitized by Google

(1) The provision of the constitution and laws of appellant, and printed in the beneficiary certificate in issue, that a member failing to pay his assessments and dues on or before the last day of the month in which they are payable, should thereby become suspended, was self-executing, and required no affirmative action on the part of appellant. Boyce v. Royal Circle, 99 Mo. App. 349; Same case, 104 Mo. App. 530; Lavin v. A. O. U. W., 104 Mo. App. 1; Harvey v. A. O. U. W., 50 Mo. App. 477; Borgraefe v. Knights of Honor, 22 Mo. App. 127; Smith v. Woodmen of the World, 179 Mo. 134; Scheele v. State Home Lodge, 63 Mo. App. 277; Curtin v. A. O. U. W., 65 Mo. App. 300; Leech v. Order of R. R. Telegraphers, 130 Mo. App. 16; Burke v. A. O. U. W., 136 Mo. App. 456; Britt v. Woodmen of the World, 153 Mo. App. 707; Thompson v. Ins. Co., 104 U. S. 252. (2) (a) The clerk of the local grove, of which the insured was a member, had no power or authority to waive the requirements of the constitution and laws of appellant and the conditions of the beneficiary certificate, and his receipt of overdue assessments and dues did not effect the reinstatement of the insured. Boyce v. Royal Circle, 99 Mo. App. 349; Lavin v. A. O. U. W., 104 Mo. App. 1; Chadwick v. Order of Triple Alliance, 56 Mo. App. 463; Smith v. Woodmen of the World, 179 Mo. 136; Smith v. K. F. M., 36 Mo. App. 184; Curtin v. A. O. U. W., 65 Mo. App. 297; Burke v. A. O. U. W., 136 Mo. App. 457. (b) Under the provisions of said constitution and laws, and conditions named in said beneficiary certificate, the insured could only be reinstated by application made in person, while in good health, and on payment of all arrearages, or by sending a certificate, in writing, on the prescribed form of appellant, certifying that she was in good health, with the necessary amount to cover all such arrearages. See authorities, supra. (3) Where the local clerk of a subordinate lodge of a fraternal beneficiary association like the one in the

Digitized by Google

case at bar, has no power under its constitution and laws to expressly waive a forfeiture of membership, his course of conduct or dealing with any particular member will not establish the existence of that power in the absence of evidence of previous authorization or knowledge thereof by the society. Chadwick v. Order of Triple Alliance, 56 Mo. App. 463; Lavin v. A. O. U. W., 104 Mo. App. 1; Burke v. A. O. U. W., 136 Mo. App. 459.

Ellroy V. Selleck and *James J. O'Donohoe* for respondents.

(1) Proof that the beneficiary certificate was issued and that Martha C. Kirkland was dead established the plaintiffs' prima facie case. Winn v. M. W. A., 157 Mo. App. 1; Bacon, Ben. Soc. and Life Ins. (3 Ed.), sec. 414; Mulroy v. Knights, 28 Mo. App. 463; Stewart v. Legion of Honor, 36 Mo. App. 319; Force v. Knights of Honor, 41 Mo. App. 106; Chadwick v. Triple Alliance, 56 Mo. App. 478; Gruwell v. Knights & Ladies of Security, 126 Mo. App. 496. (2) (a) The law is not settled in this State in reference to the power of the clerk of the local grove to waive by-laws requiring the payment of assessments at a fixed time. Godwin v. K. L. of S., 166 Mo. App. 289; Andre v. Modern Woodmen, 102 Mo. App. 377; Cauveren v. Ancient Order of Pyramids, 98 Mo. App. 433; Courtney v. Relief Assn., 101 Mo. App. 261; Frame v. Woodmen of the World, 67 Mo. App. 127; Puhr v. Grand Lodge, 77 Mo. App. 47; Lewis v. Benefit Assn., 77 Mo. App. 586; McMahon v. Maccabees, 151 Mo. 522; Cline v. W. O. W., 111 Mo. App. 601. (b) Defendant's by-laws are not self-executing. Bange v. Legion of Honor, 128 Mo. App. 461; Seehorn v. Catholic Knights, 95 Mo. App. 233. (d) They are invalid. Godwin v. K. L. of S., 166 Mo. App. 289. (e) The by-law touching reinstatement is a snare in itself. Andrus v. Ins. Co., 168 Mo. 165. (f) The

Digitized by Google

clerk of the local grove had power to waive the health certificate. And if Martha C. Kirkland was suspended the receipt and retention thereafter of assessment and dues *ipso facto* restored her to membership. Godwin v. K. L. of S., 166 Mo. App. 289; Francis and Hunter v. A. O. U. W., 150 Mo. App. 347; Reed v. Bankers' Union, 121 Mo. App. 419; Wichman v. Ins. Co., 120 Mo. App. 51; Andrus v. Ins. Co., 168 Mo. 151. (3) The defendant requested a submission by the trial court of all the controverted issues in the case and it now asks this court to condemn the trial court for doing exactly what that court was requested by it to do. Under the law, we think, shifting positions is not allowed and the verdict of the jury is binding on both parties. Berkson v. Railroad, 144 Mo. 220; Dunlap v. Griffith, 146 Mo. 292-3; Frankenthal v. Assurance Co., 76 Mo. App. 19.

REYNOLDS, P. J.—Plaintiffs, sons of Martha C. Kirkland and as such named as beneficiaries in a certificate issued to Mrs. Kirkland, bring this action to recover $500, the amount contracted to be paid in case of the death of the member while in good standing as a member of the fraternity, if the death occurred within two years after the issuance of the certificate, the member having died within two years, and for the additional sum of $100 for a monument.

The answer, setting out the constitution, laws, etc., of the order, avers that Martha C. Kirkland was suspended for nonpayment of the assessment and dues for the month of June, 1909, within that month.

Denying suspension, the reply pleaded a waiver by defendant of the prompt payment of assessments and dues and alleged that they had been paid and that the suspension was void.

The petition demanded judgment for $600, with interest at the rate of six per cent per anum, as also ten per cent on the $600 as damages and a reasonable

Digitized by Google

attorney's fee for vexatious refusal to pay the amount of the certificate. At the trial before the court and a jury there was a verdict for plaintiffs for $636, being the principal debt and interest for one year. Judgment followed, from which, after interposing a motion for new trial and excepting to that being overruled, defendant duly perfected its appeal to this court.

The defendant is an ordinary fraternal beneficiary association, incorporated under the laws of the State of Nebraska, duly authorized to transact business as such in this State. Mrs. Kirkland was a member of what is known as Grove No. 56, State of Missouri, a subordinate lodge or "grove," as it is called, of the "Supreme Forest," as the governing body is called. It appears by the evidence in the case that about the 25th of July, 1909, the husband of Mrs. Kirkland went to the clerk or secretary of this grove and tendered him the assessments and dues for the months of May, June and July, 1908. The secretary asked him how his wife was. He answered that she was "all right." Whereupon the secretary took the money and gave the husband receipts for the three assessments. It appears that the secretary had himself paid the May dues and assessments. Retaining that out of the moneys paid him by Mr. Kirkland, he transmitted that for June and July to Omaha, Nebraska, to the governing body of the order. He appears to have done this about the 10th of August, 1909, accompanying them with the statement that Mrs. Kirkland had died in the meantime and that she was under suspension for nonpayment of the June dues and assessments. The supreme body thereupon returned all the money to the secretary, who, before the institution of this suit, tendered it to the beneficiaries, the two sons of Mrs. Kirkland, first in person and then by registered mail. The tender, however, was rejected.

Mrs. Kirkland died about the 4th of August, 1909. It appears that she was taken sick sometime in July

Digitized by Google

of that year, exactly when does not appear, but it does appear that on the 23d of July, her physician commenced attendance on her and continued in attendance until she died. It clearly appears that when, on July 25th, her husband told the secretary that she was "all right," she was in fact then under the care of her physician.

Among the conditions of membership contained in the application which was signed by Mrs. Kirkland when she became a member was this: "I agree to pay all assessments and dues for which I may become liable while a member of the order, as required by its constitution and by-laws." It was set out in the beneficiary certificate that it was issued and accepted subject to all the conditions on the back thereof and subject to all the laws, rules and regulations of the fraternity, and that it should be null and void if the member did not comply with all such conditions and with all the laws, rules and regulations of the Supreme Forest. Another provision of the order was that every member, unless otherwise notified by the clerk of his or her grove, should pay to the clerk every month one assessment in the beneficiary fund, together with one monthly payment of the Supreme Forest dues, as levied, without notice, " and if he or she fails to pay either on or before the last day of the month, the member shall stand suspended and during such suspension his or her beneficiary certificate shall be void." A further provision was that the knowledge of any officer or any of the members of the grove that the member had violated any of the provisions of the laws or the receipt by his or her grove of the payments of assessments and dues, or payment by him or her of the same, "shall not in any manner make the Supreme Forest liable on his or her certificate, when by these laws his or her certificate is made null and void and all his or her rights as a member forfeited." It was further required that if a suspended member shall

Digitized by Google

personally appear and apply for reinstatement within three months from the date of suspension, he or she shall pay all arrearages, and if in good health shall be restored to membership and the beneficiary certificate again become valid as soon as said payment shall have been received and recorded by the clerk of the grove; that immediately upon the reinstatment of the suspended member, the clerk of the grove shall notify the supreme clerk of that fact in writing upon the prescribed form, attested by the grove seal. A further section of the constitution and laws provides that if a delinquent member does not appear in person to pay his or her arrearages, he or she shall send to the clerk a written statement on the official form furnished by the Supreme Forest, to the effect that he or she is in good health as a condition precedent to reinstatement "and waiving all rights thereto if said written statement shall be found to be untrue. If the representations and statements made in said written statement be untrue, then said payment shall not cause reinstatement." Another section provides that no suspended member shall be reinstated until he or she shall have appeared personally before the clerk and paid all arrearages "while in good health, or shall have sent to the clerk the written statement, on the official form hereinbefore provided for, and such statement shall have been received by the clerk, and after examination thereof the clerk shall have determined that no investigation of the health or habits of the member is necessary."

It was conceded that Mrs. Kirkland had made all payments required of her up to and including May, 1909, and during that month was in good standing in the defendant order and her beneficiary certificate in full force and effect. It is in evidence in the case, and practically conceded, that she did not make the payment due for the month of June in that month but that this payment was made by her husband to

Digitized by Google

the secretary or clerk of the subordinate grove on the 25th of July, at which time, according to the undisputed evidence in the case, she was under treatment by her medical attendant and had been so for at least two days prior thereto, dying, as also before stated, on the 4th of August, following. She furnished no health certificate and the clerk of the subordinate council asked for none, but accepted the payment in reliance upon the truth of the statement of her husband that at that time she was in good health or "all right," as he expressed it. It also appears that between the 2d and 4th of May, June and July, respectively, the clerk of the grove had mailed to Mrs. Kirkland what is called a "cautionary notice," that the assessments for those three months were due, the May assessment on or before June 1st, the June assessment on or before July 1st, and the July assessment on or before August 1st. This cautionary notice called attention to the provisions of the constitution and laws which we have set out as to the effect of failure to pay within the time required, the steps necessary to reinstatement, etc., it being particularly set out that delinquent and suspended members must under no circumstances whatsoever be reinstated unless appearing in person or signing an application for reinstatement, and then only when in absolutely good health. The notice also stated the amount of dues and assessments then payable by the member.

It appears in evidence that on several occasions Mrs. Kirkland had been in default as to payments within the time required and that up to the one for June, 1909, the clerk of her grove had, on several occasions, paid these amounts himself as a personal accommodation to Mrs. Kirkland, remitting, however, in due time to the supreme governing body, without any notification to that body that the member had not paid within time.

Digitized by Google

It is not pretended that Mrs. Kirkland was not notified of the assessments as they fell due, nor is it pretended that any formal notice of suspension was ever given or sent to her.

Our court held in Borgraefe v. Supreme Lodge Knights and Ladies of Honor, 22 Mo. App. 127, that under the law of a benevolent society which makes the nonpayment of assessments for a given period after notice, operate as a suspension *ipso facto* of the delinquent member, it is not necessary that the suspension should be judicially determined by any judicatory of the order. That is to say, suspension occurs automatically when there is a failure to pay within the time prescribed. The decision in that case has been approvingly referred to in Smith v. Woodmen of the World, 179 Mo. 119, l. c. 135, 77 S. W. 862. Among other cases following the Borgraefe case on this point is Boyce v. Royal Circle, 99 Mo. App. 349, 73 S. W. 300, which see. Another case to the like effect and with many features common to the case at bar is Lavin v. Grand Lodge A. O. U. W., 104 Mo. App. 1, 78 S. W. 325. There, citing many cases supporting the rule, it is held, referring to the obligations of the members of a like order to pay assessments levied, that the failure of the member to pay within the time, if so provided by the constitution and laws of the order, *ipso facto* forfeits all right under the certificate, our court saying (l. c. 17): "A member holding a beneficiary certificate of the order, receives this notice (of the falling in of assessments and dues) once for all when he receives the certificate which, in effect, incorporates this law of the order into the contract of insurance, and a member, by accepting the certificate, agrees to pay the monthly assessments as required, . . . as a condition precedent to the continuance of his certificate in force." [See also Burke v. Grand Lodge A. O. U. W., 136 Mo. App. 450, 118 S. W. 493.] So we here

Digitized by Google

repeat, that under the contract between the parties, nonpayment of dues and assessments within the required period, *ipso facto* effected a forfeiture of all rights under this contract, for the relation of the parties to each other was one of contract, and is determinable as in the case of any lawful contract, and while the courts do not favor forfeiture, when the contract is a lawful one, fairly made, and provides for a forfeiture, forfeiture will be enforced.

It is held in the Borgraefe case, supra, that the unauthorized acts of a ministerial officer of a subordinate lodge cannot dispense with the duty of the member to comply with the laws of the order. This proposition is affirmed in Smith v. Woodmen of the World, supra, where it was urged that the clerk of the camp of which the deceased had been a member had by his course of dealing induced the member to believe that he was not required to pay his assessments and dues on the first day of the month and in consequence thereof the defendant had waived the forfeiture. It was in evidence in that case that the laws of the order provided that if, after the first day of the month and before he had forwarded his reports for that particular month, a member came before him, the clerk or secretary, and tendered payment while in good health, he could accept payment and report him in good standing. The defendant's by-laws expressly conferred authority upon the clerk to accept dues and assessments when so tendered by a member while in good health. Under this state of facts our Supreme Court held (l. c. 135 and following): "There was no waiver, therefore, of any condition or requirement of defendant's constitution and by-laws or of the contract of the deceased, through any act of the clerk of the local camp. The acceptance by him of assessments, under the circumstances, was compliance with and not modification or waiver of defendant's law. This being true, it is unnecessary to cite authorities showing that

Digitized by Google

the clerk, under the constitution and by-laws of defendant, was without power or authority to bind the company, or to waive any provision of its law by a course of conduct in accepting the payments of assessments of delinquent members."

A member of this organization is conclusively assumed to know these provisions and to know that the secretary of the subordinate lodge had no power to accept any payment save on compliance by the member with certain prescribed rules and regulations. "The spontaneous action of local secretaries," says our court in the Boyce case, supra (l. c. 355), "of this and kindred societies in accepting dues from suspended members contrary to the constitution or by-laws, whether the acceptance be due to ignorance or complaisance, does not, *ipso facto,* reinstate the insurance and cannot have that result unless the settled rules of law governing contractual obligations are set aside as to contracts of fraternal insurance. . . . If a local secretary goes on for a considerable period accepting dues after default and remitting them to the supreme officers, who accept them with knowledge that they were paid out of time, these would be facts from which a waiver might be inferred; the waiver being founded on the notion that the member was led by the course of dealing, into believing it was all right to pay his dues after the regular date." McMahon v. Maccabees, 151 Mo. 522, 52 S. W. 384, is cited in support of this. In the case at bar, however, there is no evidence that the supreme governing body had any notice whatever of any such action on the part of the clerk or secretary of this subordinate council. Moreover, it is clear, on the uncontradicted evidence, that the clerk of the grove accepted payment from the husband of the member in reliance upon that husband's statement that his wife was then "all right." The laws of the order expressly provided that if accepted even on the faith of a written, formal cer-

Digitized by Google

tificate of health, and it develops that the statement was untrue, the acceptance is not binding. The trial court sent the case to the jury on the theory that there was evidence of waiver. The waiver here relied upon and pleaded and upon the existence of which the court instructed the jury at the instance of plaintiffs, is not sustained by any substantial evidence in the case. No knowledge of any of the acts of the clerk or secretary of the subordinate council which are claimed as waiver are brought home to the governing body of the order, and this action is against the order, not even against the clerk of the subordinate grove, assuming that the latter had knowledge of these acts, of which there is no proof whatever. The defense of waiver is practically the only one under which the plaintiff can be said to have any standing. That failing, as we hold it did, we are compelled to hold that plaintiff cannot recover. The judgment of the circuit court must be, and accordingly is reversed. *Nortoni* and *Allen, JJ.*, concur.

ERNEST CAMREN et al., Respondents, v. COLIN S. SQUIRES, Appellant.

St. Louis Court of Appeals. Argued and Submitted April 10, 1913. Opinion Filed May 6, 1913.

1. **APPELLATE PRACTICE: Disposal of Case: Theory in Trial Court.** A case will be disposed of, on appeal, on the same theory upon which it was tried by the trial court and the parties litigant.

2. **———: Conclusiveness of Findings: Equity Case.** Findings of fact by the trial court in an equity case, while persuasive, are not conclusive on the appellate court.

3. **PRINCIPAL AND AGENT: Authority of Agent: Sufficiency of Evidence.** In an action for damages alleged to have been sustained as a result of alleged fraudulent misrepresentations of a real estate agent, relating to the exchange of properties

Digitized by Google

between plaintiff and defendant, evidence *held* to show that the real estate agent was plaintiff's, and not defendant's, agent in the transaction.

4. **FRAUD AND DECEIT: Fraudulent Misrepresentations: Sufficiency of Evidence.** In an action for damages alleged to have been sustained as a result of alleged fraudulent misrepresentations of a real estate agent, relating to the exchange of properties between plaintiff and defendant, evidence *held* to fail to show that misrepresentations were made.

5. **PRINCIPAL AND AGENT: Fraud and Deceit: Misrepresentations of Agent for Both Parties.** A party to a transaction cannot recover against the other party for damages resulting from the fraudulent misrepresentation of one who is agent for both parties, where such other party practices no concealment and gives every opportunity to investigate the condition of the matter concerning which the representation was made.

6. **HUSBAND AND WIFE: Principal and Agent: Agency of Husband: Acts Binding on Wife.** Where a husband and wife together owned a farm and the wife made the husband her agent for its sale, she was bound by his negligence in effecting an exchange thereof, and hence, although the property taken in lieu of it was of much less value, she was not entitled to recover.

Appeal from Bollinger Circuit Court.—*Hon. Peter H. Huck,* Judge.

REVERSED.

Wm. M. Morgan and *Anthony & Davis* for appellants.

(1) Plaintiffs were not deceived by Squires or Smith, nor was any fraud practiced in order to obtain title to their land. So far as the two properties were concerned, after clearing mortgages and liens, there was practically no difference in value between them. (2) Even though it should be conceded that the Camrens were cheated in the trade, they bought with their eyes open. They had the opportunity to invoice, investigate and ascertain the value of the restaurant, its stock, invoices, daily sales, expenses, profits, etc.

Digitized by Google

Having failed to do these things in the face of the opportunity offered, they now have no standing either in a court of equity or court of law. Founding & Foundry Co. v. Heskett, 125 Mo. App. 516; Wade v. Ringo, 122 Mo. 322; Lewis v. Land Co., 124 Mo. 672; Jones v. Rush, 156 Mo. 364. (3) Camren was an experienced merchant, more so than either Smith or Squires. He made such investigation of the business at Jackson as he wished. He was invited to inspect the stock, invoices, sales, etc., and was told where he could find the books. He made the trade with information before him which was satisfactory to him, and with the opportunity to acquire all further information. Under these circumstances he has no standing in either a court of equity or law. Davis v. Ins. Co., 81 Mo. App. 264; Cahn v. Bungardt, 18 Mo. App. 115; Bradford v. Wright, 145 Mo. App. 623; Jones v. Rush, 156 Mo. 364; Snider v. McAtee, 165 Mo. App. 260; Stratton v. Dudding, 147 S. W. 516. (4) This being an action in equity, this court will review all the testimony, will practically try it *de novo* and will render such judgment, or direct same to be rendered by the *nisi prius* court, as may be justified by the evidence. Plumber v. Knight, 156 Mo. App. 321; Lacks v. Bank, 204 Mo. 455; Carpenter v. Roth, 192 Mo. 658; Welch v. Mann, 193 Mo. 304; Williams v. Husky, 192 Mo. 533. (5) This being an action against defendants as partners, the court, after finding they were not partners, was not authorized by the pleadings to render judgment against defendant Squires. Hagar v. Graves, 25 Mo. App. 164; Bank v. Harris, 54 Mo. App. 156; Anable v. Land Co., 144 Mo. App. 303. (6) The court was not authorized by the pleadings or evidence to render separate judgments for different amounts in favor of each plaintiff and against one of the defendants, Squires. Pattison's Missouri Code Pleading (2 Ed.), sec. 125. (7) Even though Smith may have

Digitized by Google

exaggerated the value of the restaurant business, for the purpose of enhancing the value of that property in the eyes of Camren, this would not have been a fraud. It being convenient and easy for Camren, by the exercise of ordinary prudence, to have ascertained the value of the restaurant business, it was his duty to form his own opinion and act on his own judgment. Founding & Foundry Co. v. Heskett, 125 Mo. App. 516; McFarland v. Railroad, 125 Mo. 253; Bank v. Hunt, 76 Mo. 439; Anderson v. McPike, 86 Mo. 293; Cornwall v. Real Estate Co., 150 Mo. 377; Jones v. Rush, 156 Mo. 364; Bank v. Hunt, 76 Mo. 445.

Edw. D. Hays for respondents.

(1) Defendants contend that in buying the restaurant the Camrens were put on their own inquiry and therefore they ought not to complain if they were cheated. (a) But it is the law that where fraudulent representations are made to induce a trade, or where the parties do not stand on an equal footing as to the knowledge of the facts concerning the value of the property, equity will interpose to relieve an innocent party against the wiles of an unscrupulous trader who obtains an advantage over him by fraud, whether by positive falsehood, or by the suppression of the facts which he ought in conscience to make known. Gottschalk v. Kircher, 109 Mo. 170; Cottrill v. Krum, 100 Mo. 397; Grigsby v. Stapleton, 94 Mo. 423; Pomeroy v. Benton, 57 Mo. 531; Florida v. Morrison, 44 Mo. App. 529; Derby v. Donahoe, 208 Mo. 684. (b) Where a person knowingly or recklessly makes misrepresentations of material facts for the purpose of inducing another to enter into a contract, and such person, in reliance upon such misrepresentations, enters into a contract and sustains loss, an action for deceit will lie. 20 Cyc. 44; Florida v. Morrison,

Digitized by Google

44 Mo. App. 529; Arthur v. Wheeler & Wilson, 12 Mo. App. 335; Jude v. Walker & Naxers, 215 Mo. 312. (c) The vendee of a stock of goods may maintain deceit against the vendor for a false representation of the amount of current sales where the circumstances are such that the vendee relied upon the representation of the vendor and was not shown the books of the concern. 20 Cyc. 56; Biglow on Frauds, 68; Hess v. Draffen & Co., 99 Mo. App. 580; Alexander v. Wade, 107 Mo. App. 321; Brolaski v. Carr, 127 Mo. App. 279. (2) Defendant Squires is liable even though Smith was not a partner as he represented himself to be, but was merely an agent. (a) When a fraud is perpetrated by an agent on a third party in the course of his employment and for the benefit of the principal, knowledge of the fraud must be imputed to the principal; and where the principal avails himself of the benefit of the fraud, the principal is liable. Darks v. Grocer Co., 146 Mo. App. 246; Plummer v. Knight, 156 Mo. App. 321. (b) Where one of two parties stands by and remains silent while the other sells goods and makes false representations concerning it, which induce a sale, he becomes as much a party to the misrepresentations as if he himself had made them and he is liable. 20 Cyc. 86; Judge v. Walker & Naxera, 215 Mo. 312. (3) In point 9 of his brief appellant complains that the court refused the declarations of law asked by the defendants. Actions in equity are not triable on instructions or declarations of law. This is an equity proceeding. Florida v. Morrison, 44 Mo. App. 529; Bishop v. Seal, 87 Mo. App. 256; Johnson v. Burks, 103 Mo. App. 221.

REYNOLDS, P. J.—It is claimed that this is a suit in equity. The petition avers that plaintiffs being the owner of certain described real estate in Bollinger county, this State, were induced to exchange

Digitized by Google

that real estate for a business carried on by defendants Smith and Squires in Jackson, Cape Girardeau county, under the name of Colin S. Squires & Co. That business was the conducting and operation of a restaurant and ice cream concern, and it is alleged that defendant Smith was a partner at the time of the exchange of the properties and so represented himself to plaintiffs; that Smith represented that the firm had owned and operated the business for a period of about seventeen months; that the patronage of the firm and the business had gradually increased from the time it was established in January, 1908, to the month of May, when the deal was on for the exchange of this restaurant business for the farm; that it was becoming larger and more profitable; that the gross sales of the firm in the business during the seventeen months had averaged $1000 a month, a daily average of $33.33 1-3; that relying entirely upon these representations of the defendant Smith, the trade had been made, it being agreed that Smith and Squires would pay plaintiffs $400 in money, the difference between the $2600 and the value of the farm, $3000. It is charged that all these representations of Smith as to the value of the business were false and made with the intent to deceive the plaintiffs; that plaintiffs had acted on these representations, had relied entirely upon the good faith and integrity of Smith and had trusted him implicitly as to these representations being true; that after making the exchange and taking over the business plaintiffs found that these representations as to the value of the business and as to the amount of the sales and profits were grossly false; that in truth and in fact the gross sales amounted to an average of about $707.10 per month, a daily average of $23.57, and that instead of the business increasing since January, 1908, it had been gradually falling off; that the $400 difference between the $2600 valuation at which plaintiff had taken the business and $3000,

Digitized by Google

the value of the farm, had never been paid plaintiffs by either of the defendants, and that defendants had furthermore failed to deliver and turn over to plaintiffs articles pertaining to the business, of the value of $126, and which articles were included in the sale. Judgment was prayed for the $400; and for the value of the articles not delivered and averring that the total loss of plaintiffs in the transaction was $2000, judgment was asked for that amount and that a vendor's lien be affixed on the real estate which plaintiffs had conveyed to the defendant Squires in exchange for the restaurant business.

Denying all the allegations of fraud or deceit, defendants denied that they were partners at the time of the transaction or had any joint interest in the restaurant business; denied that the real estate was taken in exchange at the valuation of $3000 but aver that the exchange of the real estate, a part of which belonged to the husband and part to the wife, was on an even trade of that for the restaurant business, both being valued at $2600; denied that defendants or either of them had sold the restaurant business for $2600, or any other sum, but aver that the transaction was an even exchange between plaintiffs and the defendant Squires, the restaurant business exchanged for the land, plaintiffs also agreeing to take care of certain judgments which were against the plaintiff Ernest Camren, and a lien on his land, and also to clear the land of an incumbrance amounting to some $216, evidenced by a deed of trust.

A reply was filed to the answers and the cause submitted to the court without the intervention of a jury, both parties as well as the court agreeing to try the case as one in equity. At the conclusion of the trial the court, after taking the cause under advisement, entered a decree discharging the defendant Smith from all demands of plaintiffs and rendering judgment in his favor. It was further adjudged and

Digitized by Google

decreed that the plaintiff, Ernest Camren, have and recover of the defendant Squires $96.87 and his costs and charges, as his proportionate share in the $126 found to be the value of articles contracted to be turned over to plaintiffs but not delivered, and that execution issue therefor, to be levied on the real estate of the defendant Squires, which land was charged with a vendor's lien for that amount in favor of Ernest Camren. It was further adjudged and decreed that the plaintiff, Cora Camren, wife of Ernest Camren, have and recover of the defendant Squires the sum of $399.13, and her costs and charges and that execution issue therefor, to be levied out of the real estate which had belonged to her, that land being charged with a vendor's lien for that amount.

A motion for new trial was filed by defendant Squires and exception saved to the action of the court in overruling it. Whereupon Squires duly perfected his appeal to this court.

Without expressing an opinion as to whether this is a suit in equity or an action at law, or as to whether plaintiffs could join in this action, we have concluded to dispose of it on the theory upon which it was tried by the trial court and by counsel for the respective parties. We have accordingly read all the testimony in the cause with very great care. We have before us, not only all the testimony, but a memorandum filed by the learned trial judge in connection with his decree. While that memorandum is not binding upon us, it has proved a great aid in getting at the theory upon which the trial court handled and disposed of the case.

Treating the case as one in equity, while the conclusion of facts arrived at by the trial court is persuasive, it does not conclude us. We have arrived at our own conclusions in the case from a very careful examination and consideration of the testimony. It may be said that in considering the testimony, we are governed somewhat by the fact that the reputation

Digitized by Google

of the plaintiff Ernest Camren for truth and veracity was very seriously assailed by several witnesses. We are unable to say how far this controlled the trial court, but we have that evidence before us and the witnesses who gave it are all neighbors, evidently men of standing in the community whose characters are in no way impugned or assailed. For that matter, no attempt whatever was made to question the general reputation and character for truth and veracity of either of the defendants. We are also determining the credibility of the testimony of the plaintiff Ernest Camren in great measure by that testimony itself, applying to it the test as to its probability. His wife also testified, as did his aged mother. But it is so evident that all of any importance they testified to, and it was not much, came to them from the husband and son, that it is hardly worth considering.

The learned trial court found that defendant Smith was acting in the transaction as the agent of defendant Squires. We have not reached that conclusion. It appears that defendant Smith, among other occupations, was a real estate agent, and that he had been approached by the plaintiff Ernest Camren to make a sale or procure a trade for him for the farm which he and his wife owned and on which they resided. Mr. Smith testified that at the close of the transaction Mr. Camren paid him $125, as commission for effecting the trade, five per cent on the agreed valuation between them of the farm, that is $2500. He paid it by check, which apparently was cashed by Smith. Mr. Camren's explanation of this is that he loaned Mr. Smith this money on his promise that he (Smith) would repay it within a few days. Smith never repaid it and there is no specific testimony on the part of Mr. Camren that prior to giving his testimony in this case he ever intimated in any way that Smith owed him $125 for borrowed money. The nearest he comes, when pressed to state whether he

Digitized by Google

had ever demanded this amount back from Smith, is to say that he "asked him (Smith) to comply with his part of the contract." That can hardly be construed into a demand for this money which, according to Camren, had nothing to do with the trade. Most certainly he did not include this item of $125 in the petition in this cause, nor seek to recover it here. Considering the whole testimony, that of Camren and Smith in this transaction and bearing in mind the explanation of both parties to the matter, we can come to no conclusion but that Smith in this trade is to be considered the agent of plaintiffs. There is not a particle of testimony that he was acting as agent for Squires. We are confirmed in this view of the case by the fact that there is no testimony whatever in it tending to show that prior to his entering upon the matter with Camren, Smith had any agency, employment or authority from Squires to sell or trade for the restaurant. Squires, it appears, was the brother-in-law of Smith and had gone into this restaurant business originally with Smith, but about four months after it was started Smith had sold out his interest to a young man named Allen. How long Squires and Allen continued in copartnership, does not appear. It does appear that when the trade was made between Squires and the Camrens, Squires alone acted, although the firm name of Colin S. Squires & Company was still used in the business. It is also in evidence that Allen was present when Camren visted Jackson to examine the business. Smith knew that Squires wanted to get out of the business and return to his original occupation of railroading, as a contractor, but apparently he did not know, until he went to Jackson with Camren and brought the two men together, that Squires would entertain a proposition to exchange his restaurant for a farm. What he did know was that Squires wanted to quit the restaurant business. Beyond all doubt Camren was the one who first ap-

Digitized by Google

proached Smith. He called on him at his business office in Marble Hill or Lutesville, it is not clear at which place—at all events in one or the other place, in Bollinger county—and told Smith he wanted to sell out or get out of that neighborhood, where he appeared to have been in trouble with some of his neighbors. His mother and wife both testified that they feared for his life there and were afraid to have him leave the house. Smith told him he probably could get a trade for him of a farm in another part of the county. Camren objected to this as too far off. Smith then told him that his brother-in-law, Squires, had this restaurant business at Jackson which he wanted to get rid of, but he did not say that Squires would trade it. Camren made no definite answer and went home. Two or three days after this talk between Smith and Camren, Smith was told by some neighbors that Mr. Camren said he wanted him to come out and see him; that they would go ahead and see if they could make the trade of the farm for the restaurant. The Camren farm was some eight or nine miles from Marble Hill and Smith went out and he and Camren went over the farm and Camren stated that his price was $2500; that he ought to have $4000 but under the circumstances he would take $2500. Smith told the Camrens about the restaurant; what he thought of it. They accordingly agreed to meet and go to Jackson together, which they did. Arriving there in the afternoon, Smith introduced Camren to Squires and left them to themselves to talk the matter over. Camren stayed at the restaurant all the evening of that day and until ten o'clock at night, when it was closed. During that evening and the next morning until train time, Camren, either in company with Squires or with Allen, went all over the premises and examined the contents, Allen pointing out to Camren certain articles of Squires or of Mrs. Squires and which were not to be included in the proposed sale.

Digitized by Google

The concern kept the usual books, journals or day books, and ledgers, and also had a book in which a complete inventory of all the property on hand belonging to the business was kept. These books were all in the restaurant while Camren was there and no attempt was made to conceal them from him or prevent him access to them. They were not offered to him, nor shown to him, nor referred to, as he made no inquiry whatever concerning them and never asked to see them. Camren did not ask if an inventory had been taken, contenting himself with his personal examination of the articles on hand, and as he says with what Smith had told him about the business. He had been in the restaurant practically all of the afternoon and until late at night and for some time the following morning, and had an opportunity to observe the business, but made no inquiry as to the daily sales or expenditures or for particulars of the stock on hand. He had, for a time, been a school teacher, had also kept a country store, and was a farmer; about forty years old; an intelligent man. He testified, when first asked as to why he had made no inquiry as to any of these matters, that when he and Smith were on the train going from Lutesville to Jackson, Smith had said to him that he did not want him (Camren) to ask any questions concerning this business "before anyone." He subsequently varied this by saying that Smith had told him not to ask anybody at all about the business and not to ask any questions of anyone about it. This is so improbable and contrary to all dealing between men of ordinary business sense that we do not believe it. To accept Camren's statement as broadly as he made it, he would have been excluded from asking any questions even of Squires or Allen or of anybody connected with the business. It is impossible to believe that even if Smith had made any such suggestion to him, it would not at once have excited the suspicion of himself or of any man as to

Digitized by Google

the good faith or truthfulness of Smith's statements concerning the business, upon which statements Camren says he was entirely relying in making the trade; that too, when he testified that he took Smith then to be a partner of Squires in the business, interested in the trade and acting for himself (Smith) and Squires. At all events, after having inspected the business as far as he thought necessary at the time, and having every opportunity to make the fullest inquiry, he and Smith left Jackson together, Squires testifying that nothing very definite had been mentioned about any trade that evening or that night but that the next morning Camren, Allen and Smith were together and he (Squires) told Camren about the business of the restaurant; does not know that they went into details; took him all over the building. Squires asked him if he (Camren) wanted to take an invoice of the stock, and Camren said, "No," that it was not necessary; that he had been over the business and that Allen had showed him and he was satisfied. Introducing Camren to Squires as the man he had told Squires about, Smith turned the matter over to them to work out together. After these two had talked it over, Smith said he did not see any reason why they could not trade, and asked them if they could "get together on a trade." Squires told Camren that they had made an invoice, a complete one, about the 1st of January, 1909, and that the invoice showed there was between $2500 and $2600 of stock and fixtures on hand. He did not show him the invoice because Camren did not ask for it. Camren asked nothing as to the total sales, or the expenses of running the business. No agreement of any kind was reached at this meeting between Squires and Camren and, as Squires testified, and in this he is in no manner contradicted, when Camren left the next morning he (Squires) did not know that any trade was going to be made. All the proposition that had been discussed between him and

Digitized by Google

Camren was that it was to be an even trade, if one was made, the restaurant for the farm. What he and Camren were both interested in knowing was whether there was any money to be paid in by either side as difference, but it was agreed that if a trade was made it was to be an even trade. Camren and Smith left the next morning, apparently returning to Bollinger county. Whether they went together or separately is not very clear.

A few days after they had been to Jackson, Camren came in to see Smith and told him that he had decided to make the deal; that he had talked it over with his wife and they had decided to go on with it. Smith said, "When are you going back to make an invoice?" Camren said that he did not care to make an invoice. Whereupon Smith said to him that he must understand that everything did not go in with that stock, that some of the things upstairs belonged to Mrs. Squires, to which Camren said that he understood, and Smith then asked him when he wanted to make the deal, and he said, "Right away." Asked about the title to his land Camren told him it was all right and Smith then asked him who would make the deed. Camren said he supposed he would have some justice of the peace make it and take the acknowledgment, to which Smith said that he would rather go out and take the acknowledgment himself and then he would know it was in right shape, but he said to Camren that he did not want to go to the trouble to prepare the deed and drive out to his (Camren's) place the next day and they "all be out of the notion" of making the deal. In answer to which Camren told Smith to come out the next day and the deed would be signed up. Smith testified that he wrote up the deed for the farm the next morning before he started, putting the consideration as $3000 and the land as 183 acres and a fraction, which was incorrect, as there were only 173 acres. He went out to Camren's house,

Digitized by Google

talked with Camren and his wife, and told the latter he had come to close up the deal for the farm. She asked him something about the business and he told her what he thought about it and they accordingly executed the deed which was afterwards delivered to Squires, Camren and his family moving into Jackson and taking possession of the restaurant and running it for a short time. To secure Squires against some judgments against Camren and a lien on the land, Camren gave a chattel mortgage on the restaurant and it appears that either under this, or under executions that were running against Camren, the property in the restaurant was sold. This is about the version of Smith and Squires.

Mr. Camren and his wife testified in the most positive terms that Mr. Smith had stated that he was a partner with Squires and that the articles in the restaurant invoiced at $2500; that it was a money-making concern; that the sales averaged about $1000 a month and were growing better, and that it was in implicit reliance on these statements, which they claim were false, that they consummated the deal.

We cannot, on consideration of all the evidence in the case, accept this as true. Even if they were, they were made by a man the Camrens believed to be acting for himself and for Squires and they had no right, as prudent people, to accept them without any investigation. They were afforded every opportunity to investigate conditions. No concealment was practiced or attempted. If they chose to shut their eyes, they must abide the consequences.

The learned trial court found that Smith, while acting as agent for Squires, was not his partner and not responsible in any amount to the Camrens; that the agreed consideration or the purchase price of the farm was $2600 and not $3000, as contended by plaintiffs; that the reasonable value of the restaurant, including the entire belongings thereto, was $1000,

Digitized by Google

and the reasonable value of the land $2600; that the reasonable value of the articles that Squires failed to turn over to the Camrens was $126. The trial court further found that Smith was the agent of Squires and while he had asked Camren not to make an investigation and that he should rely on Smith's statements as to the value, that according to the evidence Camren went to Jackson to examine the restaurant as well as the books and stayed there long enough to make a thorough examination; that he made no investigation, much less such an investigation as a reasonable man would make when an opportunity presented itself and that from all the evidence the trial judge held that he was persuaded that Camren purchased or traded for the restaurant with his eyes open and that if he was cheated he alone was to be blamed and therefore he is not entitled to any judgment in the case against either of the defendants. It is a little difficult to reconcile the ultimate finding with the facts found. But we agree with the conclusion arrived at by the trial court that Camren purchased with his eyes open and that if he was cheated he was to be blamed and could not recover.

But with this finding the learned trial court found, that treating this as an action in equity, and that while it was to be admitted that her husband acted as her agent in the transaction, it is clear from the evidence that the wife relied upon and acted under the persuasion of her husband. Acknowledging the rule of law that if an agent is derelict in his duty and the principal thereby suffers loss or damage, that the agent is responsible to the principal, the learned trial court concluded that it felt, from an equitable standpoint, that Ernest Camren being the husband of Cora had induced her to part with her separate property and that she is in no position to receive from him the amount for which she was damaged by the trade. The court therefore concluded that under the circumstances

Digitized by Google

and that right and justice may be done to all parties, Mrs. Camren is entitled to 40/173 parts of the difference in the value of the restaurant and the farm and to that percentage of the property not turned over. We are compelled to differ with the learned trial court on this conclusion, and have been referred to and know of no adjudged case that so holds. Nor are we able to sustain it on principle. Beyond all question the wife acted in the transaction through the persuasion and inducement of her husband and constituted him her agent in the transaction. As he was guilty of gross negligence in the transaction of that business, as is conceded by the court, and closed his eyes to facts that were not attempted to be concealed from him, it is impossible for us to agree with the trial court that this absolves Mrs. Camren from liability for his negligent acts as her agent. Most certainly we cannot agree that for this negligence of the agent of the wife the defendant Squires is to suffer. So concluding, puts an end to this case. On no principle of equity that we are aware of is the wife entitled to the recovery of her proportionate part of the loss as against the defendant Squires.

It follows that the finding and judgment of the circuit court must be set aside and the judgment in the cause reversed. It is so ordered. *Nortoni* and *Allen, JJ.*, concur.

Digitized by Google

JOHN ALEXANDER HARTUNG, a Minor, by Next Friend, WALTER DIEHM, Administrator, and JOHANNA MATILDE HARTUNG, Appellants, v. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Respondent.

St. Louis Court of Appeals. Argued and Submitted April 7, 1913. Opinion Filed May 6, 1913.

1. **INSURANCE: Action on Policy: Venue.** An action on an insurance policy is transitory and may be instituted anywhere that service can be had on insurer.

2. **———: Foreign Company: Action on Policy: Venue.** Under Sec. 7043, R. S. 1909, an action against a foreign insurance company may be instituted in any court in the state.

3. **EXECUTORS AND ADMINISTRATORS: Guardians and Curators: Jurisdiction: Foreign Decedent or Ward: Insurance.** The probate court of the domicile of a person whose life was insured had authority to appoint an administrator of the estate of a deceased grandchild and a curator for an infant grandchild of insured, beneficiaries under the policy, notwithstanding both grandchildren were nonresidents of this State, and such administrator and curator had the right to maintain suit against the insurer on the policy.

4. **PLEADING: Exhibits.** With the exception of an action on an account, in which case the account filed may, under Sec. 1832, R. S. 1909, be considered as part of the petition, an exhibit attached to the petition cannot be considered on demurrer.

5. **APPELLATE PRACTICE: Former Decision: Law of Case.** The opinion of an appellate court is the law of the case, and is not to be overturned unless under such circumstances and on such considerations as would compel the court to hold, on a subsequent appeal, that it was rendered under mistake of the law—and not always then.

6. **LIFE INSURANCE: Designation of Beneficiaries: Construction of Policy.** A life insurance policy for the benefit of the widow and children of insured, which stipulates that insurer will pay to the "beneficiary or their executors or administrators" the amount of the policy, and in case of the death of the "said beneficiary before the death of" insured, the amount shall be paid at maturity to the heirs or assigns of insured, designates the beneficiaries as a class, and there is no divestiture unless

Digitized by Google

all of the class die prior to the death of insured; and hence where one insured by such a policy died, leaving a wife and four children, and grandchildren of a deceased child who was living at the time the policy was issued but who died before insured died, the one-sixth interest of the deceased child in the proceeds of the policy passed to her husband and children.

7. ———: **Action on Policy: Parties: Joinder.** The grandchildren of an insured in a life policy, who, on the death of insured, took, by descent and purchase, their deceased mother's vested interest as beneficiary under the policy, could jointly maintain an action against the insurer to recover that interest.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. H. Shields,* Judge.

REVERSED AND REMANDED (*with directions*).

Rudolph Schulenburg and *Walter Diehm* for appellants.

(1) The curator herein was lawfully appointed and the St. Louis Probate Court acted entirely within its jurisdiction in making the appointment. Sec. 3488, R. S. 1899 (under which it was then proceeding) now Sec. 414, R. S. 1909. (2) But even if this were not so, the judgment of a probate court is not open to collateral attack. Crohm v. Modern Woodmen of America, 129 S. W. 1069; Carter v. Carter, 141 S. W. 873; Cox v. Boyce, 152 Mo. 576; Woerner on Guardianship, p. 111. (3) An action upon a policy of insurance is not local, but transitory, and may be brought wherever the defendant may be served without reference to the citizenship of the parties or location of the property. 2 Wharton Conflict Laws, p. 1048. And this right cannot be contracted away. Reichard v. Life Ins. Co., 31 Mo. 518. (4) The action on a life insurance policy accrues in the county where the insured died. In the instant case, the insured died in St. Louis where also he had resided before his death. Life Ins. Co. v. Shelton, 84 Mo. App. 634; Rippstein

Digitized by Google

v. Insurance Co., 57 Mo. 86. (5) A beneficiary in a life insurance policy has a vested interest in the same from the moment it is issued. Shields v. Sharp, 35 Mo. App. 178; Blum v. Life Ins. Co., 197 Mo. 513; Casualty Co. v. Kacer, 169 Mo. 301; Bank v. Hume, 128 U. S. 195. (6) In three cases involving the construction of a policy containing clauses identical with the one in suit, the courts have decided that where the policy provides that the insurance shall be payable "to the said beneficiary or their executors, administrators or assigns, etc.," but contains a clause that "In case of the death of the said beneficiary, before the death of the person whose life is assured, the amount of the assurance shall be payable to the heirs or assigns of said person whose life is assured," that the last quoted clause is only to be invoked in case of a total failure of beneficiaries, and that the interest of a beneficiary who died before the assured, descends to his heirs. Diehm v. Life Ins. Co., 129 Mo. App. 256; Clark v. Dawson, 195 Pa. 137; Wharton v. Drewry, 135 Ga. 587. (7) A policy of life insurance being a post mortem provision for persons dependent upon the assured, is to be interpreted upon principles applicable to wills and should be liberally construed so as to include persons presumably the objects of the assured's bounty. McDermott v. Life Assn., 24 Mo. App. 73; Scull v. Life Ins. Co., 132 N. C. 32, 60 L. R. A. 616.

Stonewall J. Walton for respondent.

REYNOLDS, P. J.—This is the second appeal in this case. The view which our court took of it will be found under the title of Diehm, Curator of Estates of Hartung et al. v. Northwestern Mutual Life Insurance Co., 129 Mo. App. 256, 108 S. W. 139. The point in decision in that case was that the interest of a beneficiary in the proceeds of an insurance policy is

Digitized by Google

vested and descendible unless an intention to the contrary appears on the face of the policy, and so holding, the trial court having sustained a demurrer to the petition in the case and rendered judgment for the defendant, we reversed the judgment and remanded the cause. On reaching the trial court an amended petition was filed, the only change, however, being in the names of the parties plaintiff, one of them having died, another attaining majority, and the third suing by curator, claiming appointment from the probate court of the city of St. Louis. On the cause reaching that court, an answer was interposed, setting up that the company had paid the amount in full to the widow and surviving children of the beneficiary and that on this payment the policy was cancelled and surrendered to the defendant; denying the validity of the appointment of the administrator of the deceased daughter of the beneficiary, Mrs. Isabella Hartung, and of the appointment of a curator for her minor children, and setting up that Mrs. Hartung, the daughter of the insured, had died before his death; averring that by the terms of the policy, on the death of this daughter prior to the death of her father, whatever interest she may have had as a beneficiary in the policy was divested by her death prior to the death of her father, and that her husband and children took no interest whatever in the fund. Various denials of the domicile and residence of the minor plaintiffs were made but in the view we take of the case they are not material to be set out.

The reply took issue on the affirmative allegations of the answer, admitting however payment of the amount of the policy in full to the widow and four surviving sons and daughters of the insured.

The cause was submitted to the court, a jury being waived, on an agreed statement of facts, some documentary evidence also being offered not necessary to notice in the view we take of the case.

Digitized by Google

By the policy of insurance here involved, it is contracted that the defendant company "doth assure the life of Charles Wezler, a merchant of St. Louis, in the county of St. Louis, State of Missouri, for the benefit of Caroline Wezler, his wife, and his children by her, in the amount of $5000, for the term of his natural life. And the said company doth hereby promise and agree to pay the said sum assured, at its office, to the said beneficiary or their executors, administrators or assigns, in sixty days after due notice and proof of death of the said person whose life is hereby assured. . . . In case of the death of the said beneficiary, before the death of the person whose life is assured, the amount of the assurance shall be paid at maturity to the heirs or assigns of the said person whose life is assured."

As is stated in the report of the case when here before, the deceased died, leaving a widow and four sons and daughters surviving him, one daughter, Mrs. Isabella Hartung, who was married and living in Germany, having died prior to the death of her father, leaving surviving her her husband and three children. Administration was taken out in the probate court of the city of St. Louis on the estate of Mrs. Hartung and a one-sixth interest in this policy was inventoried and taken up by the administrator as of her estate, and payment of that demanded of the defendant and refused. Administration was duly closed on the estate of Mrs. Hartung, the administrator being ordered to distribute to her heirs the assets in his hands. He did this, among other assets turning over to those heirs, that is the husband and the three children, the claim against this company for one-sixth of this $5000 policy. Subsequently the father assigned all of his interest to his three children and this present suit is by one of those children, who has attained majority, by the administrator of another, who is dead, and by the curator, as before

Digitized by Google

stated, of the third child, a minor, all of whom appear to have always been and are now residents of Germany, although proof was offered, but rejected, that the father was a naturalized citizen of the United States but domiciled in Germany.

The jurisdiction of the probate court of the city of St. Louis to appoint a curator for the children, or for that matter to appoint an administrator for the estate of the mother, the estate of all of them consisting, among other things, of this interest, is attacked as void. We cannot agree to this contention. Actions against insurance companies on their policies are transitory and may be instituted anywhere that service can be had upon the corporation. Their claim to an interest in this policy was the claim of a debt. It has been decided in several cases that debts have no situs but may be attached or followed in a State other than that in which the debtor is a resident, if the fund or assets of the debtor can be there found, and that action may be brought to recover the debt in any court in which jurisdiction can be had over the person of the debtor. [Wyeth Hardware & Mfg. Co. v. Lang & Co., 127 Mo. 242, 29 S. W. 1010; Howland v. Chicago, R. I. & P. Ry. Co., 134 Mo. 474, 36 S. W. 29; Western Stoneware Co. v. Pike County Mineral Springs Co., Vandeventer Trust Co., Garnishee, 172 Mo. App. 696.] Action may be instituted against a foreign insurance company, as is defendant, in any court in the State. [R. S. 1909, sec. 7043; Stone v. Travelers' Ins. Co., 78 Mo. 655.] We have no doubt whatever as to the jurisdiction of the probate court to make the appointment of the administrator and the curator here involved.

The effect of our opinion in Diehm v. Northwestern Mutual Life Ins. Co., supra, which is this case under another title, is challenged as not binding for the reason, as it is said, that when this case was before us on that occasion, what is called the "divestiture clause" of this policy, that is, "In case of the

Digitized by Google

death of the said beneficiary, before the death of the person whose life is assured, the amount of the assurance shall be paid at maturity to the heirs or assigns of the said person whose life is assured," was not before the court. It is true that the case when formerly here went off on demurrer to the petition. But it is equally true that in considering that demurrer our court had before it this identical policy and these particular provisions in it, including what is called this "divestiture clause." Whether the policy was incorporated in full in the petition or this clause of it pleaded, we are unable to determine from a report of the case. That was probably the fact, for if the policy was a mere exhibit, it is hardly to be supposed that, not being an action on an account, in which case the account filed may be considered on demurrer (R. S. 1909, sec. 1832; Garnett & Allen Paper Co. v. Midland Publishing Co., 156 Mo. App. 187, l. c. 196, 136 S. W. 736), it was not before our court on a demurrer to the petition, unless embodied in the petition in some way other than as an exhibit. [Kern v. South St. Louis Mut. Ins. Co., 40 Mo. 19; Pomeroy v. Fullerton, 113 Mo. 440, 21 S. W. 19; Haase & Sons Fish Co. v. Merchants' Despatch Transportation Co., 143 Mo. App. 42, l. c. 56, 122 S. W. 362.] However that may have been, at this present trial the policy was put in evidence and is before us. Whether it was before our court in the Diehm case in proper form, is not now material, for it is clear that this clause was distinctly set out by Judge GOODE, who wrote the opinion, and it is the construction of that clause of the policy that was directly adjudicated in this same case and between these same parties or their privies. The opinion and judgment then rendered by us became the law of this case and is not to be overturned unless under such circumstances and on such consideration as would compel us to hold that it was rendered under mistake

Digitized by Google

of the law; not always then. That we are not inclined to do.

It is now urged by the learned counsel for the respondent that that decision is in conflict with and was overturned by the decision of the Supreme Court in Andrus v. Fidelity Mutual Life Ins. Assn., 168 Mo. 151, 67 S. W. 582, and that it was on that view of the case the learned trial judge found for respondent, defendant below. We do not think the Andrus decision overturns the Diehm case. It is further to be said that the view of the law as applicable to almost identical clauses in other policies which was taken by our court in the Diehm case, was adopted by the Supreme Court of Pennsylvania in Clark v. Dawson, 195 Pa. St. 137, and by the Supreme Court of Georgia in Wharton v. Drewry, 135 Ga. 587.

On the authority of our decision in the Diehm case, we hold that the mother of these children took a vested interest in and to one-sixth of the amount here involved and that on her death it went to her husband and children; that it was not divested by her death prior to the death of her father, the assured. We further hold that the designation of the beneficiaries is as a class; that there would be no divestiture unless all of that class had died prior to the death of the assured. Support is given to this view by the words of this clause in the policy, namely, payment is to be made within sixty days after due notice and proof of death of the assured, "to the *beneficiary*" (mark the use of the singular here, not plural), "or *their* executors, administrators or assigns." The assured must have had in mind the possibility of the death of one or more of the designated beneficiaries before his death, and he provides that if this occurs, their executors, administrators or assigns take. Then when we come to what is called the "divestiture clause," the language is: "In case of the death of the said *beneficiary*" (singular again), . . . "the

Digitized by Google

amount of the assurance shall be paid at maturity to the heirs or assigns of the said person whose life is assured." This leads to the conclusion that the first takers are designated as a class, and that the divestiture only occurs, if even then, when all of the members of the class had died prior to the death of the assured. The husband of Mrs. Hartung assigned his interest to the children and they are entitled by descent or purchase to the whole of the interest of their mother. The Andrus case, supra, is authority for the proposition that they may jointly sue to recover that interest.

The judgment of the circuit court in the case at bar must be reversed and the cause remanded with directions to that court to enter up judgment in favor of plaintiffs for one-sixth of the amount of the policy sued on and interest. It is so ordered. *Nortoni* and *Allen, JJ.*, concur.

In re FRANK G. KOEHLER.

St. Louis Court of Appeals, May 6, 1913.

1. **EXECUTIONS: Examination of Judgment Debtor: Corporations: Officers.** Sec. 2248, R. S. 1909, providing that, when an execution against the property of a judgment debtor is returned unsatisfied, the judgment creditor may obtain an order for the examination of the judgment debtor, does not include persons not parties to the cause, and hence does not include the officers of a corporation judgment debtor.

2. **CONTEMPT: Corporations: Punishment.** Contumacious corporations are not reached by attachment and fine of their officers (unless they are personally in contempt), but by distringas or writ of sequestration.

3. **EXECUTIONS: Examination of Judgment Debtor: Construction of Statutes.** Sec. 2248, R. S. 1909, providing that, when an execution against the property of a judgment debtor is returned unsatisfied, the judgment creditor may obtain an

Digitized by Google

order for the examination of the judgment debtor, and the following kindred sections, are highly penal, and hence they must be construed strictly, both as to the cases embraced within their terms and as to the methods to be pursued.

4. **STATUTES: Construction: Penal Statutes.** A highly penal statute which provides a new and extraordinary remedy must be construed strictly, both as to the cases embraced within its terms and as to the methods to be pursued.

5. **EXECUTIONS: Examination of Judgment Debtor: Other Witnesses.** Sec. 2248, R. S. 1909, *et seq.*, providing for the examination of a judgment debtor after an execution has been returned unsatisfied, are not intended to furnish a means for procuring evidence from witnesses generally, but their sole purpose is to secure testimony from the judgment debtor, and no other witness is to be examined.

6. ———: ———: **Prerequisites.** It is a condition precedent to the making of an order for the examination of a judgment debtor, after return of an execution unsatisfied, that the court find, as required by Sec. 2249, R. S. 1909, that there is reasonable ground to believe that the judgment debtor has property subject to execution, or has conveyed or attempted to convey it with a design to defraud creditors.

7. ———: ———: **Affidavit for Order: Sufficiency.** An affidavit in support of an order for the examination of a corporation judgment debtor and its officers, after return of the execution unsatisfied, under Sec. 2248, R. S. 1909, *et seq.*, which avers that the affiant is informed and believes that defendant has property subject to execution, but does not aver that it has conveyed or attempted to convey its property to defraud its creditors, and which avers that the property subject to execution and which it has concealed, consists of unpaid liability of stockholders, and that the officers are familiar with the facts concerning the identity of the stockholders and their residence and the extent of their liability, and that the officers are to be examined as to all other facts concerning the assets of the corporation, is insufficient to justify an order, since the only asset it shows the execution debtor possessed was unpaid stock subscriptions and the names of the delinquent stockholders are to be ascertained, and their liability enforced, in a different character of proceeding.

Habeas Corpus. Original Proceeding.

WRIT AWARDED.

William Hilkerbaumer for petitioner.

Digitized by Google

(1) The affidavits filed by plaintiff praying for an examination of the judgment debtor are insufficient to support the order of March 10, 1913, because they do not state facts sufficient to entitle plaintiff to such order. They state that plaintiff "is informed and believes and has reasonable ground to believe that defendant has property subject to execution." This is not a compliance with the statutes which requires that it must appear to the court that there is reasonable ground to believe that the judgment debtor has property. The plaintiff's belief on the subject, or whether he has reasonable grounds, is immaterial and cannot justify the order. The affidavits should state sufficient facts from which the court can find that there is reasonable ground to believe that the judgment debtor has property. R. S. 1909, sec. 2249; Ackerman v. Green, 201 Mo. 231; 107 Mo. App. 349. (2) The circuit court had no power under the statute to issue an attachment for this petitioner, and has no power to punish him for contempt for failure to appear for the reason that the statute in express terms limits the power of the court to attaching and punishing the judgment debtor. R. S. 1909, sec. 2249; Ackerman v. Green, 201 Mo. 244, citing Schroerer v. Christophel, 64 Mo. App. 83, and Baker v. Railroad, 36 Mo. 545; 36 Cyc. 1172, 1188. (3) The statute has no application to corporations. This for the following reasons: (a) It is apparent from a reading of sections 2248, *et seq.*, that a corporation was not in the legislative mind when the statute was enacted. (b) There are other statutory remedies for the relief of creditors of corporations, particularly where, as here, unpaid stock liability is sought to be reached. See Secs. 3004-5, R. S. 1909, providing for execution against stockholders and securing the necessary information for such proceeding. (c) Only the judgment debtor can be examined and the examination must be under the oath of the judgment debtor. A corporation cannot take

Digitized by Google

an oath. (d) The examination of this petitioner would not be a compliance with the statute, as it would not be an examination of the judgment debtor under the oath of the judgment debtor, but would be an examination under the oath of petitioner. R. S. 1909, secs. 2248 to 2253, 3004-5; Ackerman v. Green, 201 Mo. 231; 36 Cyc. Law & Proc., pp. 1172, 1188; Schroerer v. Christophel, 64 Mo. App. 83; Fiedler v. Const. Co., 162 Mo. App. 540; N. Y. Civil Code of Proc., secs. 2463, 1784, 1809-12; Levy v. Piano Co., 39 N. Y. Supp. 409; Stephens v. Page, 24 N. Y. Supp. 698; 10 Cyc. 1143.

Fordyce, Holliday & White and *Fred Armstrong, Jr.*, for Albert S. Baker.

(1) Sec. 2248, R. S. 1909, provides for the examination of "any judgment debtor" under certain circumstances (the existence of which in the present case is not denied) provided section 2249 has been complied with. Sec. 2249 provides that before an order for such examination shall issue it must be "made to appear to the court, or judge or justice by affidavit or other evidence satisfactory to the court, or judge or justice that there is reasonable ground to believe that such judgment debtor has property subject to execution." (a) The verified petition for examination in the present cause is alone sufficient affidavit to justify the issuance of such an order. Ackerman v. Green, 201 Mo. 231. (b) The acts of courts of record are presumptively valid and if the verified petition for examination is not alone sufficient, it will be presumed in the absence of proof to the contrary that there was "other evidence satisfactory to the court" to justify the issuance of the order. (c) Not only are the acts of courts of record in general presumptively valid, but in this instance petitioner is held prisoner under a writ valid on its face, and he must affirmatively prove its invalidity, if it is invalid. Sec. 2474, R. S. 1909;

Digitized by Google

Ex parte Bowler, 16 Mo. App. 14; Ex parte Krieger, 7 Mo. App. 367; In the matter of Clark, 126 Mo. App. 401; In re McBride, 158 Mo. App. 452. (2) Sec. 2248 covers the examination of a corporation through its officers. Sec. 8054, R. S. 1909; Secs. 3003, 3014, 3016; 17 Cyc. 1411, and cases cited; 21 Cent. Dig. sec. 1106ff; 8 Dec. Dig., sec. 372ff; Bates v. International Co., 84 Fed. 518; Wallace v. Sawyer, 54 Ind. 501; Hammond v. Hudson River, etc., 11 How. Pr. 29; Curtois v. Harrison, 12 How. Pr. 359; Tompkins v. Floyd, 19 Ind. 197; Steel v. Trading Corporation, 6 B. C. 158; Hamilton v. Stewiacke, etc. Co., 30 N. S. 92; Logan v. McCall Pub. Co., 140 N. Y. 447; Bank v. Harrison, 57 Mo. 503; Shockley v. Fisher, 75 Mo. 498. (3) If section 2248 does cover the examination of a corporation the court can enforce such examination by appropriate common law remedy if the remedy is not provided in the statute. Cummings v. Winn, 89 Mo. 51; Householder v. Kansas City, 83 Mo. 488; 1 Cyc. 700; 1 Dec. Dig. 279; 1 Cent. Dig. 1261; Hickman v. Kansas City, 120 Mo. 110. (4) Frank G. Koehler personally has no right to object to the examination any more than a witness has a right to object to examination. Ackerman v. Green, 201 Mo. 241.

REYNOLDS, P. J.—In May, 1909, one Baker brought his action against the Standard Truck & Forging Company, a corporation, the action brought in the circuit court of the city of St. Louis. Service was had on the corporation defendant, as appears by the return of the sheriff to the summons in that action, by delivering a copy of the writ and petition to one Frank G. Koehler, its president. The corporation defendant appeared, demurred, that being overruled, filed an answer, the cause was set for trial, both parties appeared by their attorneys and introduced witnesses, the defendant, among other witnesses, introducing Mr. Koehler, who testified that he was presi-

Digitized by Google

dent of the defendant corporation. This occurred in December, 1910. A motion for new trial was filed by the defendant and sustained. The cause was afterwards set for trial on the 2d of April, 1912, plaintiff appearing, but defendant not appearing, judgment was rendered against the defendant for $4983.12 and costs. No appeal was ever taken from this judgment. Afterwards an execution was issued on this judgment and returned *nulla bona* and on October 23, 1912, plaintiff filed a petition in which is set out the recovery of the judgment, the issue of the execution and the return of that by the sheriff *nulla bona*. The motion or petition then proceeds:

"Plaintiff further states that he is informed and believes, and has reasonable ground to believe, that the defendant herein has property subject to execution and that among said property is an unpaid stock liability of various stockholders in said defendant company, but that the names of said stockholders are unknown to plaintiff.

"Wherefore, plaintiff prays that, in accordance with section 2248 of the Revised Statutes of Missouri, 1909, this court require said defendant to appear before this court at a time and place in such order to be named, to undergo an examination under oath, touching its ability and means to satisfy said judgment.

"Plaintiff further prays that this court require defendant to respond to this order in the person of its president, Frank G. Koehler, its secretary, William Schwarting, and such other officers and agents as may be familiar with all or any part of the facts concerning the identity of its stockholders, their present residence, the extent to which their stock may have been paid and the manner in which payment was made, if any, and all other facts concerning the property and assets of the company."

Digitized by Google

This motion or petition is signed, "Albert S. Baker, by Fred Armstrong, Jr., Attorney," and to it is attached an affidavit to the effect that "Fred Armstrong, Jr., being on his oath duly sworn, deposes and says that all the facts stated in the above motion are true according to his best knowledge and belief." This is signed, "Fred Armstrong, Jr.," and the customary jurat affixed by a notary public. Nothing appears to have been done under this motion but afterwards what is called a "Renewed Motion for Examination of Defendant" was filed. This renewed application after setting out the filing of the former one, then recites that:

"Whereas the granting of an order in pursuance of said motion was opposed by the defendant and others, necessitating a consideration of said matter by the court and a continuance from time to time and from court term to court term of said matter; and

"Whereas after a full consideration of said matter this honorable court granted an order in accordance with said motion overruling all objections to the issuing of said order; but,

"Whereas some question has been raised as to the validity of said order on the ground that proper orders of continuance were not entered by the court to maintain the matter on its docket from time to time and from term to term;

"Now, without admitting that the order heretofore issued by the court for the examination of defendant in accordance with said previous motion is invalid, but merely in order to place the matter beyond possible dispute, plaintiff herein renews and again makes his application for examination of the defendant and hereby files this, his motion for examination of defendant, as follows:"

Then follows the former motion, which is copied into this renewed motion verbatim. This is signed,

Digitized by Google

"Fred Armstrong, Jr., Attorney," who makes affidavit before a notary public that the facts stated in the above motion are true according to his best knowledge and belief.

It is recited in the petition for the writ of *habeas corpus* that proof of service of the order requiring defendant, in the person of its president, to appear and undergo an examination under oath touching the ability of the defendant to satisfy judgment rendered in the cause was filed. This is the order which appears to have been made by the court:

"It appearing to the court that heretofore, to-wit: on the 10th day of March, 1913, an order was made by this court in the above cause, requiring the defendant in the person of its president, Frank G. Koehler, its secretary, William Schwarting, and such other officers and agents as may be familiar with all or any part of the facts concerning the identity of its stockholders, their present residence, the extent to which their stock has been paid, and the manner in which said payments were made, if any; and all other facts concerning the property and assets of the defendant company, to appear in this court and in Division No. 9 thereof, on March 14, 1913, at 10 o'clock a. m., then and there to undergo an examination, under oath, touching the ability and means of the defendant to satisfy the judgment rendered in this cause in favor of plaintiff and against defendant on the 2d day of April, 1912, for the sum of $4983.12, interest and costs; and it further appearing to the court that the sheriff of the city of St. Louis has made return on said order, by delivering a copy of the same to the within named Standard Truck & Forging Company and Frank G. Koehler, on the 13th day of March, 1913, and that William Schwarting cannot be found in the city of St. Louis; and it further appearing to the court that said defendant and its president Frank G. Koehler has failed to com-

Digitized by Google

ply with said order made and entered March 10, 1913, although duly called, now come not; upon motion of plaintiff by attorney, it is now ordered by the court that the sheriff of the city of St. Louis be and he is hereby commanded to attach Frank G. Koehler by his body and him safely keep so that he have his body before this court and in Division No. 9 thereof on Friday, March 21, 1913, at 10 o'clock a. m., then and there, to testify and the truth to say, as far as he may be familiar with all or any part of the facts concerning the identity of the stockholders of the Standard Truck & Forging Company, their present residence, the extent to which their stock has been paid, and the manner in which said payments were made, if any, and all other facts concerning the property and assets of the defendant company, and to undergo an examination, under oath, touching the ability and means of the said defendant company to satisfy the judgment heretofore rendered in this cause and also to answer to a contempt of this court in having failed to comply with the order heretofore made and entered in this cause March 10, 1913, a copy of which was duly served upon said Frank G. Koehler by the sheriff of the city of St. Louis."

Under this order of attachment the petitioner Koehler was taken into custody by the sheriff of the city of St. Louis and applied to a judge of this court, in vacation, for discharge under the provisions of the habeas corpus act.

The petition for the writ of habeas corpus sets out, among other matters, that Koehler, the petitioner, is not a party to the action in which Albert S. Baker is plaintiff and the Standard Truck & Forging Company, a corporation, is defendant; that the only pretext or reason for issuing a writ of attachment against the petitioner is his failure to appear in the circuit

Digitized by Google

court on the 14th of March, 1913, in response to the order of the court of date March 10, 1913, requiring that corporation to appear to be examined as to its ability to satisfy the judgment rendered in the cause, a copy of the order being attached to the petition and being the one heretofore set out by us; that said order, made on the affidavit and renewed affidavit before referred to, was made without any notice having first been given the petitioner and without any order, citation, subpoena, or other process having first been issued, requiring him to appear in court at that time except as set out in the papers before copied. The petitioner avers that the order of March 10th does not require respondent to appear in court; that the court had no power or jurisdiction to make the order; that the affidavits therefore show upon their face that they do not state facts sufficient to give the circuit court authority or jurisdiction to make the order; that the petitioner had filed an affidavit in the proceeding showing that he was not, at the time the original application was filed, either the president or any other officer of the corporation and had no right or authority to appear for it, and that the facts stated in the affidavit made by your petitioner were not denied by the plaintiff in the proceeding. The petitioner now states in this application for the writ of habeas corpus that he was not at that time and is not now and has not been for many years, the president or other officer of the corporation and that the court has never ascertained or found it was a fact that the petitioner is or was at any such time the president or other officer of the corporation. It is further averred in the petition for the writ of habeas corpus that the circuit court had no jurisdiction or power to require the corporation to appear in court and undergo examination as a judgment debtor; that it has no jurisdiction or power to require the corporation to appear in court in

Digitized by Google

the person of the petitioner or to require the petitioner to appear in court as president or other officer of the corporation under the facts stated in the application or in the order; that the order was never served on the defendant corporation; that the return of the sheriff to the service of the order on the defendant is false and the recital therein "that your petitioner is the president of the corporation is untrue," and that the circuit court has acquired no jurisdiction over the judgment debtor. Averring that no application for the relief sought herein has been made to or refused by any court or officer superior of this court, the petitioner prays that the writ of habeas corpus be granted, directed to the sheriff of the city of St. Louis, commanding him to have the body of Frank G. Koehler, petitioner, before the judge of our court to whom this application was presented, at a time and place herein to be specified, etc. This is signed and sworn to by the petitioner.

The sheriff made return to it in due time, setting up the before-mentioned writ of attachment as his authority for holding the petitioner, and the cause was set for hearing before the court.

By leave of court the attorneys representing the plaintiff in the before-mentioned judgment have appeared and filed a statement and brief in support of the action of the circuit court, and the cause has been submitted to us on written and printed arguments of counsel for petitioner and for the judgment creditor, the latter as for the sheriff.

Evidently this proceeding under and by which the petitioner has been attached and is held, is sought to be sustained on the authority of sections 2248, 2249, Revised Statutes 1909. Section 2248 provides, in substance, that when an execution against the property of any judgment debtor issued from any court in this State shall be returned unsatisfied in whole or in part

Digitized by Google

by any sheriff or other proper officer, the judgment creditor in the execution may at any time within five years after the return so made be entitled to an order by the court in which the judgment was rendered, requiring the judgment debtor to appear before the court at a time and place in the order named to undergo an examination under oath touching his ability and means to satisfy the judgment, "and in case of neglect or refusal on the part of such judgment debtor to obey said order, such court . . . is hereby authorized to issue a writ of attachment against said debtor, as now provided by law, and to punish him for contempt." Section 2249 provides that the order above provided for shall issue only in case it is made to appear to the court "by affidavit or other evidence satisfactory to the court or judge or justice, that there is reasonable ground to believe that such judgment debtor has property subject to execution, or has conveyed or attempted to convey his property, with a design to defraud, hinder or delay his creditors—such affidavit to be made to the best of the knowledge and belief of the affiant." The remaining sections down to and including section 2253, provide for carrying on this examination and for the filing of an opinion by the court upon the result of the examination, in the event that there is a finding that the debtor is possessed of property subject to execution. These provisions appeared in our law for the first time in 1865, where by act approved February 16, 1865 (Laws 1864-1865, p. 271), they were adopted as they now appear in our revision with some slight changes made in what is now section 2248, by an act approved March 24, 1887 (Laws 1887, p. 187), and by some verbal changes made in section 2249 by the compilers of the revision of 1889, but they have been substantially in the shape that they now appear ever since 1865. Prior to the adoption of our code, a disclosure of documents as well as of testimony

Digitized by Google

desired from the parties to the suit or action was made under the old chancery practice by bills of discovery. These bills of discovery were not only provided for in all our laws down to 1849, when our present code was adopted, but were recognized as an appropriate mode of procedure in several decided cases. They were rendered necessary for the reason, among others, that parties to the cause were generally not called as witnesses by the adversary party and taking their testimony by way of depositions in advance of the trial of the cause was practically an unknown procedure. Since the adoption of our code, bills of discovery, as such, have, while not abolished in so many words, fallen into disuse, until, as held in many decisions, they are no longer allowed, chiefly for the reason that the changes made by the code have done away with the necessity for a resort to that mode of securing testimony. [See Vogelsong v. St. Louis Wood Fibre Plaster Co., 147 Mo. App. 578, 126 S. W. 804, and cases there cited.] While our code permitting the examination of parties to a cause by means of depositions, as well as at the trial, obviates the necessity of a resort to the bill of discovery, these sections 2248 and following, may be said to have many of the characteristic of the old bill. Thus, as with a bill of discovery, so by these provisions, their object is to elicit testimony and place it of record in court for use by the parties in proceedings to which it was applicable. That is effected by section 2251, which provides that if it appears by the examination that the debtor owns property which ought to be applied to the payment of the judgment, the court delivers an opinion in writing to that effect and files it—but it is provided that this opinion "shall have no other or different effect in law, as to title, than as herein provided." Referring to the practice under bills of discovery, Mr. Justice STORY says (Story's Equity Pleading (10 Ed.), sec. 312, "that

Digitized by Google

a bill of discovery properly so called, never prays any relief." So it will be seen by the above section is the case with our statute.

Referring to bills of discovery, Mr. Justice STORY says in the same work (section 317): "One of the fundamental rules of this branch of equity jurisprudence is, that the plaintiff is entitled only to a discovery of what is necessary to maintain his own title; as, for example, of deeds under which he claims. But he is not entitled to have a discovery of the title of the other party, from whom he seeks the discovery;" while in section 318, Judge STORY says that the title and interest in the plaintiff "must be shown to be present and vested; for, where the plaintiff in his bill shows only the probability of a future title or interest upon an event, which may never happen, he has no right to institute any suit concerning it, either for discovery or for relief."

Another fundamental rule applied in bills of discovery was, that their operation was confined to the parties to the suit or action.

In 2 Daniell's Chancery Pl. & Pr. (6 Am. Ed.), *p. 1558, it is said: "A bill of discovery, in aid of proceedings in another court, cannot be maintained against a person who is not a party to such proceedings."

In Queen of Portugal v. Glyn, 7 Clark & Finnelly's Rep., 466, it is held that a bill of discovery in aid of a defense to an action cannot be sustained against a person who is not a party to the record at law; they are permitted for the purpose of obtaining from the adversary at law a discovery of matters, which, being admitted by him, may aid in the defense to the action, but not for the purpose of obtaining evidence; a bill of discovery does not lie against a person who may be a witness for the defendant to the action. This was a case in which a bill of discovery was

Digitized by Google

sought by the defendant but it is just as applicable where it is brought by plaintiff.

In Manchester Fire Assurance Co. v. Wykes, 33 Law Times Rep. (N. S.) 142, it is held that a bill of discovery in aid of an action at law cannot be sustained against a person who is not a party to the record, although he might in point of fact be the only person interested in the result of the action. The point was held the same way in Kerr v. Rew, 5 Mylne & Craig's Rep. 154. The rule was again so stated in Balls v. Margrave, 3 Beavan, 448, it being there held that the practice as to bills of discovery brought in aid of an action at law does not permit any person to be made a defendant to a bill of discovery in aid of an action who is not a party to that action.

Our own Supreme Court in Nancy v. Trammel, 3 Mo. 306 (top page 216, republication 1843), recognizes this same rule as in force when our courts were proceeding under the old chancery practice; that is, a bill of discovery only lay between the parties of record to the cause and did not reach information or documents or testimony in the hands of or possessed by parties other than the parties of record.

It would appear, by examination of these sections of our statute, that this same rule has been followed, and that these sections are applicable alone to, and are not intended by our legislators to reach beyond the parties to the cause; that they do not subject those not parties of record to proceedings under them. Their verbiage surely is susceptible of no other construction. In so many words it is provided that it is the defendant in the judgment and execution who is to be subject to examination. Here the defendant is a corporation, not an individual. Can we apply these provisions to a corporation by summoning its officers?

We are cited to section 8054, R. S. 1909, and kindred sections which provide that when the word "per-

Digitized by Google

son" is used, it shall be held to include corporations. But we are unable to see how that helps the case. Granting that the word "person" includes a corporation, and that the defendant is a corporation, there is no escape from the proposition that the examination is confined to that of the defendant in the action and as to its ability to pay. Conceding that a corporation can only answer by and through its officers, where is there in section 2248 and those following, any authority to subject the officers of the corporation to these sections? It is provided in this section 2248 that "in case of neglect or refusal on the part of such judgment debtor to obey such order," the court "is hereby authorized to issue a writ of attachment against said debtor, as now provided by law, and to punish him for contempt." The writ of attachment here referred to is of the person, not of the goods of the corporation, or of the individual, but of the person. As we held in Fiedler v. Bambrick Construction Co., 162 Mo. App. 528, l. c. 538, *et seq.*, 142 S. W. 1111, corporations in contumacy are reached, not by attachment and fine of their officers, unless personally in contempt, but by distringas or writ of sequestration. So that it is clear that the lawmaker did not have corporations in mind when enacting these statutes.

That corporations, corporate officers, are not within the words of the statute seems too clear for argument. That this is an omission of the lawmakers is not even apparent, for by the provisions of our laws ample means are afforded for reaching information as to assets of corporations. Furthermore, under our laws, corporations, artificial bodies acting through their officers and boards of directors, cannot hide assets as can an individual. Their acts are generally written in their records; these can generally be reached and produced. So that there is not the opportunity for concealment as in the case of individuals. The petitioner here is in no sense the debtor in the execu-

Digitized by Google

tion. It is not pretended that he owes the plaintiff, nor that he had concealed assets of the corporation defendant.

Furthermore this is a highly penal statute. The recalcitrant witness, defendant in the execution, is subject to punishment on attachment as for contempt if he refuses to attend, submit to examination and make answer.

We cannot extend such a statute by construction to anyone not clearly within its letter. These sections of the statute provide a new and extraordinary remedy. They "must be construed strictly, both as to the cases embraced within their terms and as to the methods to be pursued." [36 Cyc., p. 1188, sec. 8.] They provide for summary proceedings, "and strict conformity to the statute, in the exercise of the jurisdiction it confers, is essential to the regularity and validity of the proceeding." [36 Cyc., p. 1189, sec. b.]

We are referred to no case whatever, under a statute similar to ours, in which it is held that any but the defendant in the execution is subject to the provisions of section 2254. The few cases that have been before our courts construing these sections, namely, State ex rel. Ames v. Barclay, 86 Mo. 55; In re Frederick Knaup, 144 Mo. 653, 46 S. W. 151; Ackerman v. Green, 201 Mo. 231, 100 S. W. 30; Murphy v. Wilson, 84 Mo. App. 178; Ackerman v. Green, 107 Mo. App. 341, 81 S. W. 509, are all cases in which the proceeding was against the debtor in the execution. They all, it is true, happened to be individuals but there is no suggestion whatever in any of these cases that the court has any power to compel by attachment or other process anyone other than the defendant in the judgment and execution, to appear and submit to an examination for the discovery of assets said to be concealed by the debtor and attempted to be put beyond the reach of the debtor's creditors.

Digitized by Google

These sections are not intended as a substitute for procuring evidence from witnesses generally. Their sole purpose is to secure the testimony of the defendant in the execution. No witness but the defendant in the execution is to be examined.

Nor are they intended as a substitute for procuring the evidence that is here sought to be elicited. The very petition or application or motion, which ever it may be called, discloses that the object of the judgment creditor is to have this petitioner, alleged to be an officer of the corporation, disclose the names of the stockholders of the corporation and the payments made by them to the corporation on the stock subscriptions or holdings. In some of its aspects the claim of the plaintiff in this execution, the judgment creditor, is very much like that of the plaintiffs in Blanke v. St. Louis-Sonora Gold & Silver Mining Co., 35 Mo. App. 186. There the plaintiff sued on behalf of himself and all other creditors of the defendant corporation, to compel the defendant corporation to disclose the names of its stockholders and the amount paid by them on their stockholdings. Judge THOMPSON, who wrote the opinion of this court, agreed to by all the members, holds that no such action is maintainable, because the statute affords a complete remedy for the collection of unpaid subscriptions on capital stock, and it may also be said that it provides in express terms for the manner in which the names of stockholders in the corporation shall be obtained through the sheriff from the secretary or person in charge of the corporate books. [R. S. 1909, secs. 3004, 3005.]

Nor does it appear by the motion and affidavit filed, or by anything in the record, that in issuing the order the trial court found from evidence before it that there was reasonable ground to believe that the judgment debtor had property subject to execution, as the court is required by section 2249 to find.

Digitized by Google

With these remedies open to the judgment creditor we have no doubt, irrespective of the question of the right to call and examine and attach and punish an officer of a corporation, for failure to appear as a witness and be examined in a cause in which he is not the defendant, that there is not here presented a situation warranting the trial court in issuing an attachment against this petitioner, assuming that he is the president of the corporation, himself not a party of record to the action. All that is said as to this is, that the affiant is informed and believes "that the defendant herein has property subject to execution." It is not averred, as required by section 2249, that the defendant has conveyed or attempted to convey its property with a design to defraud, hinder or delay its creditors. That no general averment of possession of property or concealment of property is here meant, is clear. What is meant by the averment that defendant has property subject to execution and has concealed it, etc., is qualified and explained by the following averment that the property is the unpaid liability of various stockholders. In the order for the attachment it is set out as a reason for citing the petitioner as president, and the secretary of the company, that they are familiar with all or part of the facts concerning the identity of the stockholders, their present residence, the extent to which their stock has been paid and the manner in which such payments were made. It is true that this is followed by the general statement, as in the motion, that they are to be examined and testify as to "all other facts concerning the property and assets of the defendant company." Whether these properties and assets are "subject to execution" (Sec. 2249) is nowhere averred. While our Supreme Court held in Ackerman, Admr. v. Green, supra, following the same case in our court (107 Mo. App. 341) that the allegations in these motions are not required to be as specific as in a petition, and that general allegations

Digitized by Google

are good, an examination of what are then held good as general allegations upon which the averment of belief that the debtor has concealed assets subject to execution were sufficient, shows that they are definite as compared with those before us, much more particular than any here set out. As said before, the only specification here of property subject to execution is alleged unpaid stock subscriptions, the names of stockholders, and these, as are here seen, are to be ascertained and reached by an entirely different proceeding. We hold that there is no case here made subjecting this petitioner to the provisions of these sections of the statute.

Whether the affidavit required by section 2248 may be made by anyone but the judgment creditor, that creditor an individual and not a corporation, is neither considered nor determined; nor do we determine whether the petitioner, as an individual or even as an officer, can be brought in without notice of the intended application, he not being the defendant—it having been held in Ackerman v. Green, supra, and other cases above cited that the defendant is not entitled to notice; nor do we pass on any of the other points made and raised in the petition, return and by counsel, confining our decision to the propositions expressly covered by us, namely, that this statute does not reach corporate officers and that this petitioner is not subject to its operation, he not being the debtor.

The order of the circuit court directing the petitioner to appear and be examined as a witness and the attachment issued on his failure to do so, to compel him to appear and his arrest under that attachment are void. The petitioner is discharged. *Nortoni* and *Allen, JJ.*, concur.

Digitized by Google

JOHN E. ESQUE, Respondent, v. UNITED RAILWAYS COMPANY of St. Louis, Appellant.

St. Louis Court of Appeals. Submitted on Briefs April 9, 1913. Opinion Filed May 6, 1913.

1. **TRIAL PRACTICE: Evidence: Leading Questions.** In an action for personal injuries sustained by reason of "an unusual, sudden and extraordinary jerk in starting and thereupon instantly stopping" a street car, a question propounded to a witness on direct examination, "Was there anything unusual in the starting or stopping of the car?" was leading, and an objection thereto was, therefore, properly sustained.

2. **APPELLATE PRACTICE: Rulings on Evidence: Review.** Where the record does not show the ground of objection to a leading question put to a witness on direct examination, the appellate court will assume that it was leveled against the form of the question and that the court sustained it on that ground.

3. **TRIAL PRACTICE: Evidence: Admissibility.** The fact that improper testimony is admitted on behalf of one party without objection from the adverse party does not give the latter the right to introduce improper testimony in rebuttal, over the objection of the other party.

4. **DAMAGES: Husband and Wife: Recovery by Husband for Injury to Wife: Loss of Wages and Profits.** A husband is entitled to recover for his loss of wages or earnings or profits in his business which he has sustained in consequence of waiting upon his wife, negligently injured; but it is essential to a recovery that he show by evidence the amount of wages, value of time, or the amount of profits, lost.

5. ———: ———: ———: **Loss of Time: Necessity of Proving Value: Instructions.** In an action by a husband for damages sustained by reason of the injury of his wife, evidence that he did work about the house and was up at night and that it would have cost a certain amount to have employed a servant, had no tendency to prove the value of his time while caring for his wife, and there being no other evidence bearing on this question, an instruction, authorizing a recovery for time plaintiff was compelled to spend in caring for his wife, was erroneous, as not supported by evidence.

6. ———: ———: ———: ———: ———: ———. In an action by a husband for damages sustained by reason of the injury

Digitized by Google

of his wife, where plaintiff did not prove the value of his time while caring for his wife, an erroneous instruction, allowing a recovery for loss of time, could not be held nonprejudicial on the theory that the jury merely awarded nominal damages on this item, since the appellate court cannot say that the jury disregarded the instruction or that it failed to influence them as to the amount of their verdict.

7. **APPELLATE PRACTICE: Erroneous Instructions: Presumptions.** The appellate court, on appeal from a judgment for plaintiff in an action for personal injuries, will presume that the jury followed the instruction on the measure of damages, authorizing an award for elements not warranted by the proof, and that they included an award for these improper elements in their verdict.

8. **———: Erroneous Instructions on Measure of Damages: Review.** To render an error in an instruction on the measure of damages, arising from the fact that it includes improper elements of damages, reviewable on appeal, it is not essential that the verdict be attacked in the motion for a new trial on the ground of excessiveness.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm,* Judge.

REVERSED AND REMANDED.

Boyle & Priest and *Paul U. Farley* for appellant.

(1) The court erred in giving plaintiff's instruction No. 4, in that it was error to authorize plaintiff to recover "compensation for time (if any) plaintiff himself was compelled to spend in attending and caring for his said wife, by reason of said injuries." (a) Because there was no proof that plaintiff suffered any damage as a result of spending time in attending and caring for his wife. Morris v. Railroad, 144 Mo. 500; Gibney v. Transit Co., 204 Mo. 722. (b) Because there was no proof of the value of such services. Gibler v. Association, 203 Mo. 223; Cobb v. Railroad, 149 Mo. 630. (2) The court erred in excluding competent, material and relevant testimony offered by defendant. Bartley v. Railroad, 148 Mo. 140.

Digitized by Google

Alfred A. Paxson for respondent.

(1) Instruction No. 4 authorizing the jury to allow plaintiff to recover "compensation for time (if any) plaintiff himself was compelled to spend in attending and caring for his said wife, by reason of such injuries," was correct and proper under the decisions of the appellate courts of Missouri. Kirkpatrick v. Railroad, 129 Mo. App. 524; Smith v. St. Joseph, 55 Mo. 459; Blair v. Railroad, 89 Mo. 389. (a) Exact proof that plaintiff suffered damage as a result of spending time in attending and caring for his wife not being obtainable is not required. Mabrey v. Road Co., 92 Mo. App. 596; Peltia v. St. Louis, 237 Mo. 694; Jennings v. Appleman, 159 Mo. App. 12. (b) The only proof that could be made was furnished. (c) This point with its "subs," however, is not in the case as appellant made no complaint in its motion for new trial that the verdict was excessive. Sweet v. Maupin, 65 Mo. 70; Dazey v. Laurence, 153 Mo. App. 442. (2) It was not error for the court to refuse to let defendant's motorman give his opinion on the main issue in the case as to whether there "was anything unusual or extraordinary in the starting or stopping of the car." De Meat v. Storage P. & M. Co., 231 Mo. 620; Koenig v. Railroad, 173 Mo. 698; Benjamin v. Railroad, 133 Mo. 289; Lee v. Knapp & Co., 155 Mo. 641.

REYNOLDS, P. J.—Plaintiff, the husband of Mrs. Elizabeth Esque, brought his action against the defendant street railway company, the petition as amended charging that the defendant, unmindful of its duty to safely carry the wife of plaintiff as a passenger, and in violation of its contract so to do, so carelessly and negligently conducted itself in the premises that "by an unusual, sudden and extraordinary jerk in starting and thereupon instantly stopping" the car upon which plaintiff's wife was a passenger, the wife,

Digitized by Google

by this negligence and carelessness and want of skill of defendant's agents in charge of the car, was mangled, bruised and greatly injured, thrown to the floor and against the sides of the car, another passenger in the car being jerked and thrown violently against the wife, whereby her back, hips and spine were sprained and contused, causing her much pain, giving her a severe nervous shock and seriously and permanently impairing her health. By reason of the injuries to his wife plaintiff avers that he has lost her services and will lose them in the future; "that he has suffered the loss of the society and companionship of his wife and has had to devote his personal care and attention to her, and has been put to great expense for doctor's bills, in the sum of $100, medicines, in the sum of fifty dollars, nursing and attention, in the sum of $200, directly resulting from her said injuries," damages being claimed in the amount of $5000.

The answer, after a general denial, pleads contributory negligence on the part of the wife, to which there was a reply.

The trial before the court and a jury resulted in a verdict in favor of plaintiff in the sum of $1200. Interposing a motion for a new trial and excepting to that being overruled, defendant has duly perfected its appeal to this court.

There are only two errors assigned as grounds for reversal: First, as to an instruction given at the instance of plaintiff on the measure of damages, and, second, as to the exclusion of competent, material and relevant testimony, as it is charged.

Disposing of this last contention first, while the motorman who had been in charge of the car in which plaintiff's wife was injured, was under examination as a witness for the defendant, he was asked: "Was there anything unusual or extraordinary in the starting or stopping of the car?" This question was objected to by counsel for plaintiff, the objection sus-

Digitized by Google

tained, and it was to this action of the court that the second error above referred to is assigned. Counsel for appellant argue that this was not mere opinion evidence which was sought, but the statement of a fact and was competent evidence. However that may be, and we do not pass upon that proposition, the question was leading, and while the ground of the objection to the question does not appear in the record, the presumption always is in favor of right action on the part of the court, and we may assume that the objection was to the form of the question as leading. That was a good objection. The learned counsel for appellant contend that plaintiff had himself recognized the necessity of proving the allegation that there was an unusual stop. That may be, but that does not dispense with the necessity of eliciting proof by proper questions. The same counsel further claim that a witness for plaintiff, when under examination by counsel for plaintiff, was asked what kind of a stop he would say that was, and that this opened the matter to defendant. An examination of the abstract shows that the answer of the witness was, "I would say it was very sudden and violent; just a jerk. A sudden, violent stop; unusual. If stopped gradually, it wouldn't have thrown a person off their feet." Counsel for defendant moved that the last sentence of the answer be stricken out, to which counsel for plaintiff assented. Thus it appears that beyond the last sentence of this answer, counsel made no objection whatever to it. It can hardly be contended that because counsel, without objection, had allowed improper testimony to be elicited, he could take advantage of it to the extent of putting in improper testimony himself, that testimony objected to.

The instruction of which complaint is made, and on which the first assigned error is based, in enumerating the elements of damage which the jury were to

Digitized by Google

take into consideration, if they found in favor of plaintiff, told the jury that they might consider: "First, damages (if any) which have resulted, and which will be reasonably certain to result in the future to plaintiff, from the impairment of his wife's ability to perform domestic services for the family. Second, damages (if any) resulting to plaintiff from the loss of his wife's society and companionship in the past, as well as in the future. Third, the reasonable amount which plaintiff paid, or became liable to pay for doctor's bills not exceeding $100, medicine, not exceeding fifty dollars; and fourth, *compensation for time (if any) plaintiff himself was compelled to spend in attending and caring for his said wife, by reason of such injuries, and altogether not to exceed the sum of* $5000."

The error complained of in this instruction is the part of the fourth paragraph which we have underlined.

A very careful examination of the testimony in the case fails to show a scintilla of evidence as to the value of plaintiff's time while caring for his wife. His testimony is that he did work about the house and was up at night and that to have employed a servant he would have been obliged to spend a certain amount of money named. This part of it is fairly covered by the instruction as to the first element of damage, namely, damages suffered by him from the impairment of his wife's ability to perform domestic services for the family. It cannot be held as covering compensation for his own time spent in attending and caring for his wife.

Counsel for respondent, not claiming that there is any evidence as to the value of the husband's time, claims that this instruction was correct under the decisions of our Supreme Court in Smith v. City of St. Joseph, 55 Mo. 456; Blair v. Chicago & A. Ry. Co., 89 Mo. 383 (referring to a local citation in this at page 389), 1 S. W. 350; and under Kirkpatrick v. Metro-

Digitized by Google

politan St. R. Co., 129 Mo. App. 524, 107 S. W. 1025, a decision by the Kansas City Court of Appeals.

We find nothing in Smith v. City of St. Joseph, supra, sustaining this contention. It is stated in the opinion that the husband in attendance upon his wife had to neglect all of his business and that if he had not cared for her in person he would have been under the necessity of hiring some one to do it in his stead. In this aspect of the case our Supreme Court says an instruction was justified which told the jury, among other things, that if they found for plaintiff they would assess his damages at such sum as shown by the evidence would compensate him for the expense necessarily incurred in nursing and taking care of his wife for the time she was diseased and disabled on account of the injury she had sustained. There is no suggestion made that there was a lack of evidence as to the value of this time. To the contrary, as the jury was directed to the evidence concerning this, it is to be assumed there was such evidence. This is a fair assumption from what Judge WAGNER, who wrote the opinion, says to the effect that the only serious objection made to this instruction is that it allows the plaintiff to recover compensation for his services in waiting upon his wife during her illness. He then says that under all the circumstances surrounding the case he thinks the instruction was right. That simply lays down the rule that the husband can recover for his services in a given case in attendance on his wife, but is very far from supporting the proposition that the jury can assess the value of those services in the absence of any evidence whatever as to that value.

We are referred to page 389 as the local citation in Blair v. Chicago & A. Ry. Co., supra. Turning to that page we find no reference whatever to this point, except that Judge SHERWOOD, in stating the averments in the petition, says that it is stated in the petition, which in the first count sought to set aside and

Digitized by Google

cancel what was claimed to be a release, that nothing was considered in the settlement except six days' loss of time at five dollars a day. At page 396, however, it is said that there was no claim in the petition for loss of time and that there was no call to instruct the jury on matters not in issue. We are unable to see how this touches the matter here under consideration.

Kirkpatrick v. Metropolitan St. R. Co., supra, was an action brought by a husband to recover damages alleged to have been sustained by him in consequence of personal injuries suffered by his wife as the result of the negligence of the defendant. It appears that the plaintiff, in support of his case, introduced evidence to the effect that the husband (plaintiff) conducted a grocery in Kansas City; that the family consisted of the husband, the wife and grown daughter; that their living rooms were over the grocery; that for some time the wife had performed the work of a clerk in the store, in addition to attending to her household duties. It was shown that the reasonable value of her services as clerk was twelve dollars a week but that she voluntarily contributed these services to her husband's business without compensation. Timely objections were made by the defendant to the introduction of evidence relating to these services in the store and their reasonable value, but the trial judge overruled the objection and in the instruction given to the jury on the measure of damages included as an element of plaintiff's damage, compensation for the loss of such services. "This," said Judge JOHNSON, speaking for the Kansas City Court of Appeals (l. c. 527), "is reversible error." We hardly think that this can be said to support the claim of counsel for respondent. Furthermore in a dissenting opinion by Judge ELLISON, the cause was certified to the Supreme Court. What became of it there we are not advised. But ac

Digitized by Google

cepting the opinion of the majority as correct, we are unable to see how it sustains respondent.

To the contrary, and as showing error in this part of this fourth clause of the instruction, we are referred by counsel for appellant to Morris v. Grand Ave. Ry. Co., 144 Mo. 500, 46 S. W. 170; Cobb v. St. Louis & H. Ry. Co., 149 Mo. 609, 50 S. W. 894; Gibler v. Terminal R. R. Assn., 203 Mo. 208, 101 S. W. 37; Gibney v. St. Louis Transit Co., 204 Mo. 704, 103 S. W. 43.

In the Morris case, supra, commencing at page 505, it is said, referring to cases of this kind, that they are not for exemplary damages, but are "predicated alone upon the idea of compensation for injuries done and losses sustained. In addition to what the jury might award plaintiff for his suffering and physical injuries, they are authorized to compensate him for his pecuniary losses actually sustained, and not those that might or would have occurred but for the interposition of others through kindness or charity." It is then held that where the services of a physician or other party were rendered through charity, there could be no recovery for their value. It is further held that the instructions in these cases, to be correct, must contemplate compensation for a pecuniary loss, not punishment, and that if plaintiff did not lose anything then there is nothing to compensate. Lee v. Western Union Tel. Co., 51 Mo. App. 375, is cited and quoted approvingly by the Supreme Court in the Morris case, in which case, referring to the claim for loss of time suffered by the husband in attendance upon his wife, it is said by the Kansas City Court of Appeals: "If this element of damages is allowed (that is for wages), the case is landed in the absurdity that the defendant is allowed to recover twenty-four dollars for lost wages, when his own testimony shows that the wages were not lost but were paid to him by his employer."

In Cobb v. St. Louis & H. Ry. Co., supra, at page 630, Smith v. Chicago & A. R. Co., 108 Mo. 243, 18

Digitized by Google

S. W. 971, is referred to with approval as deciding that where no evidence was given as to the value or charges of the physicians employed, the judgment was properly reversed on account of such failure.

In Gibler v. Terminal R. R. Assn., supra, an instruction was given to the effect that plaintiff was entitled to recover damages for any expenses necessarily incurred by him for medicines, etc., which the jury might believe from the evidence he had incurred by reason of said injuries and directly caused thereby. It was objected to this instruction that there was no evidence upon which to base it. Our Supreme Court held that damages of this character, that is, by way of compensation for injury, cannot be allowed except upon proof; that the jury should not be permitted to speculate in an effort to award full compensation for actual damages suffered.

In Gibney v. St. Louis Transit Co., supra, the instruction authorized recovery by way of damages for any expense necessarily incurred for nursing. Judge BURGESS, at page 722, calls attention to the fact that by the evidence it appeared that the only persons who attended plaintiff as nurses were her daughters, members of her family, there being no express contract to pay them for their services. It was contended by the defendant in that case that such services are presumed to have been rendered gratuitously. Judge BURGESS says that as a rule such services involve no legal liability upon the part of the person for whom rendered and therefore afford no basis for a claim. He quotes approvingly from Voorheis on Damages for Personal Injuries, sec. 18, as saying: "The injured person cannot recover as expenses the value of the services of any one of his family in nursing him, unless there was an express agreement by him to pay therefor. Such nursing involves no legal liability on his part, and therefore affords no basis for a claim against the defendant, as for expenses paid. In the

Digitized by Google

absence of an express contract, the law will not presume one, so long as the family relation continues. An injured person may hire an adult member of his family to nurse him, or to prescribe for him as a physician, in the same manner and with like effect that he may hire a stranger."

The rule we deduct from these cases is that while plaintiff was entitled to recover damages for loss of his wages or earnings or profits in his business that he sustained in consequence of waiting upon his wife, it is necessary to his right of recovery that he show by evidence in the case the amount of wages, value of time, or of amount of profits in his business which he had lost. For an absolute lack of any evidence of this kind in this case, this clause in the instruction rendered the whole instruction error.

We are told, however, by the learned counsel for respondent, that even in the absence of evidence as to the amount of wages lost and the value of the time given up to the care of his wife, that plaintiff was entitled to recover at least nominal damages and that we may assume that is all that the jury allowed in this case. In support of this proposition, we are cited to Peltier v. City of St. Louis, 237 Mo. 686, 141 S. W. 608. In that case at page 694, it is said that in the instruction there under consideration, the jury were told, among other things, that they might consider any expense the plaintiff might have incurred for medicines, medical attendance and nursing, etc. Our Supreme Court holds that in the light of the evidence set out they are of the opinion that the objection to the instruction was not well founded; that while it is true that the evidence of plaintiff shows she did not need much medicine and presumably she did not incur much of a debt on that account, the appellate court had no right to presume under that evidence that the jury allower her anything more than a nominal sum therefor, which they had a perfect right to do. We do not think

Digitized by Google

that this fits the case here. In the Peltier case there was evidence that she had expended "some" money for medicines, etc., but the amount was not stated. It was on this showing that the court held that the jury might presume that medicines had value and that plaintiff was entitled to at least nominal damages for the amount. But that is not the case here. We have no evidence whatever on which the jury was authorized to find that this plaintiff had devoted any time whatever that was of any value to him, in the sense of being time in which he was earning wages, in the care and attention to his wife. As said by our Supreme Court in the Gibney case, as a member of the family and as husband, particularly, he owed attention to his wife, and unless in giving that attention he had suffered pecuniary loss, such as losing his wages, or the like, he was not entitled to recover for his time.

In the case at bar the jury were distinctly told, in this fourth clause of the instruction, that the plaintiff was entitled to recover compensation for time, if any, which he himself was compelled to spend in attending and caring for his wife. We cannot say that the jury disregarded this or that it failed to influence them in the amount of their verdict, although it is true that the verdict is not very large. But in order to sustain this verdict we would be compelled to hold that the jury had entirely disregarded that clause of the instruction. We cannot hold that they awarded merely nominal damages for this item. If they did disregard the instruction, that was error. But the instruction itself was erroneous, for as before stated there was no evidence of time lost from work, or wages lost, on which to award plaintiff even nominal damages. Murray v. Mo. Pac. Ry. Co., 101 Mo. 236, 13 S. W. 817, is overruled in Cobb v. St. L. & Han. Ry. Co., 149 Mo. 609, l. c. 630, 50 S. W. 849.

We are told that the verdict is for the right party and that even if this instruction was bad in this par-

Digitized by Google

ticular, the verdict and judgment should be sustained. This proposition is answered by our Supreme Court in Morris v. Grand Ave. Ry. Co., supra, where at page 508, it is said, answering the same proposition: (We quote slightly paraphrasing the words of the opinion by substituting "plaintiff" in place of "doctor," as was the case before the Supreme Court.) "Whatever might be the views of this court as to the correctness of the judgment in a general way, and even though the verdict was for less than we might think the testimony warranted, still we cannot say that an instruction was not prejudicial which directed the finding for a definite item of damages that the jury had no right to consider, and which we must suppose they did consider, in making up the total estimate of damages as indicated by the verdict. To suppose that the jury considered the instruction would be to conclude that they committed error in estimating plaintiff's damages by the amount of the value of the (plaintiff's) services (as to which there is not a particle of testimony). This certainly is not a case, where from a consideration of all the facts, the presumption may be indulged, to sustain a verdict and the judgment based thereon, that the jury included no improper elements of damages, for we must presume the jury did as they were instructed, and that was to include an improper item in estimating plaintiff's damages."

Finally, it is said that this error in the instruction should have been made in the motion for a new trial by an attack on the verdict as excessive. We do not agree to this proposition. The error is in a specific instruction to find on an element of damage, of which there was no proof whatever.

The judgment of the circuit court is reversed and the cause remanded. *Nortoni* and *Allen, JJ.*, concur.

Digitized by Google

CLARA A. GOODES, Respondent, v. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Appellant.

St. Louis Court of Appeals. Argued and Submitted April 7, 1913. Opinion Filed May 6, 1913.

1. **EVIDENCE: Expert Evidence: Invading Province of Jury.** In an action on an accident insurance policy, where the question of the cause of insured's death is in issue, one of the functions of an expert witness is to give his opinion of the cause of death, basing it on the hypothetical case; and such an opinion is not objectionable as usurping the province of the jury.

2. ———: ———: ———. In an action on an accident insurance policy, where the question of whether insured died from an accident resulting from a fall, or from apoplexy, was in issue, plaintiff's counsel propounded a hypothetical question to a physician, which, after hypothesizing that insured sustained a fall and other facts connected with the death, concluded with a request that the witness give his opinion of the cause of death. The witness answered that the death was the result of a concussion and compression of the brain, brought about from a hemorrhage proceeding from a fracture at the base of the skull, which fracture was caused, in the hypothetical case stated, by the fall. *Held*, that neither the question nor the answer was improper as seeking to substitute the witnesses' opinion for the verdict of the jury.

3. **TRIAL PRACTICE: Directing Verdict: When Proper.** Where the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, would have to be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant; otherwise, the case is for the jury.

4. **ACCIDENT INSURANCE: Death by Accident: Sufficiency of Evidence.** In an action on an accident insurance policy, evidence *held* sufficient to establish that insured died from bodily injury effected through external, violent and accidental means, within the provisions of the policy.

5. ———: ———: **Burden of Proof.** In an action on an accident insurance policy which provides for the payment of a certain sum if insured die from bodily injury effected through ex-

Digitized by Google

ternal, violent and accidental means, the burden of proof is on the plaintiff to show that death resulted from such means alone.

6. **EVIDENCE: Presumptions: Inferences.** It is not permissible, in a court of law, to base presumptions upon presumptions and inferences upon inferences; but it is the province of the jury to draw all proper inferences which the facts in evidence warrant.

7. **ACCIDENT INSURANCE: Death by Accident: Proximate Cause: Instructions.** In an action on an accident insurance policy, providing for the payment of a certain sum if insured die from bodily injury effected through external, violent and accidental means, where the question of whether insured died from an accident resulting from a fall, or from apoplexy, was in issue, the court instructed that, before the jury could find for plaintiff, they must find that the direct cause of insured's death was bodily injury effected through external, violent, and accidental means alone, independent of all other causes, and that his death did not happen directly or indirectly in consequence of disease, and was not caused wholly or in part by bodily infirmity or disease, and that there were external or visible evidence or marks of such accident on his body. In another instruction, the court charged that, if insured accidentally slipped and fell, and that this was the direct cause of the bursting of a blood vessel, which resulted in his death, then the fall was the direct cause of his death, notwithstanding the jury might find that he was suffering from diseased arteries, heart and kidneys. *Held*, that the instructions sufficiently charged that the accident must have been the direct cause of death, in order to authorize a recovery, especially in view of a further instruction that, if the fall was caused by apoplexy or a hemorrhage brought on by a diseased condition of the arteries, plaintiff could not recover.

8. ———: ———: **"Visible Marks" on Body.** In an action on an accident insurance policy, providing that the insurance should not cover any death "of which there shall be no external or visible marks on the body," a recovery cannot be had unless there were such marks on the body of insured; but the issuance of blood from his ear and nostril after his death is a "visible mark," within the policy.

9. ———: ———: **Diseased Condition of Insured: Contributory Cause of Death.** Where the death of insured proximately results from bodily injury effected through external, violent and accidental means, a recovery may be had under an accident insurance policy, providing for the payment of a certain sum if insured die from bodily injury effected through external,

Digitized by Google

violent and accidental means, and providing that the insurance should not cover death directly or indirectly happening in consequence of disease, or caused wholly or in part by bodily infirmities or disease, although a diseased condition contributes to the death; the question determinative of the right of recovery being that of proximate cause—if the immediate cause of death is disease, there is no liability, but if the immediate cause is an accident, there is.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm,* Judge.

AFFIRMED.

Thomas G. Rutledge and *Augustus T. Seymour* for appellant.

(1) The burden of proof was on the plaintiff below to show that the death of insured was caused by bodily injury effected through external, violent and accidental means and that this alone caused his death. Masonic Assn. v. Shryock, 73 Fed. 774; Laessig v. Assn., 169 Mo. 272; Ins. Co. v. McConkey, 127 U. S. 661; Stanton v. Ins. Co., 78 Atl. 317; National Assn. v. Scott, 155 Fed. 92; Commercial Assn. v. Parks, 179 Fed. 794; Binder v. Acc. Assn., 127 Iowa, 25; White v. Ins. Co., 95 Minn. 77. (2) The evidence is undisputed that the diseased condition of the arteries of the insured was an essential contributing factor in causing his death, and there can be no recovery under the contract in this case. The court below erred in refusing to instruct the jury, at the close of plaintiff's evidence, to find for the defendant. Masonic Assn. v. Shryock, 73 Fed. 774; Ins. Co. v. Selden, 78 Fed. 285; Commercial v. Assn. v. Fulton, 79 Fed. 423; Hubbard v. Mut. Assn., 98 Fed. 930. (3) It is not permissible in a court of law to base inference upon inference, or presumption upon presumption. The verdict in this case rests upon a series of conjectures and not upon positive proof. Such a verdict cannot stand. Ins. Co. v. Selden, 78 Fed. 285, 288; United States v. Ross, 92

Digitized by Google

U. S. 281; Manning v. Ins. Co., 100 U. S. 695-697; National Assn. v. Scott, 155 Fed. 92-95; Bank v. Stewart, 114 U. S. 231; Cunard v. Kelly, 126 Fed. 610; Postal, etc., Co. v. Livermore, 188 Fed. 696. (4) Where the evidence is as consistent with the cause of death not accidental as with an accidental cause, the verdict should be for the defendant. Carnes v. State Assn., 106 Iowa, 281. (5) Expert witnesses may not usurp the functions of a jury, nor be permitted, in answering hypothetical questions, to state what, in their opinion, was the cause of the death of insured. Baehr v. Surety Co., 133 Mo. App. 541; Glasgow v. Railroad, 191 Mo. 361; Bragg v. Railroad, 192 Mo. 331; State v. Hyde, 234 Mo. 200; Jones on Evidence, secs. 372, 373. (6) Where the violence of the injury was not alone sufficient to account for death, and the existence of the disease is an essential factor in the fatal result, plaintiff is not entitled to recover under the terms of the contract involved in this case. Carr v. Ins. Co., 100 Mo. App. 602; Fetter v. Fidelity Co., 174 Mo. 256; Masonic Assn. v. Shryock, 73 Fed. 774; Ins. Co. v. Selden, 78 Fed. 285; Commercial Assn. v. Fulton, 79 Fed. 423; Hubbard v. Accident Assn., 98 Fed. 930.

McDonald & Taylor and *Jacob Chasnoff* for respondent.

(1) The trial court properly construed the contract of insurance as permitting recovery notwithstanding the fact that the insured was at the time of his death suffering from disease, if the accident proved was the sole, direct and efficient cause of the death. Beile v. Protective Assn., 155 Mo. App. 629; Driskell v. Ins. Co., 117 Mo. App. 362; Fetter v. Fidelity & Casualty Co., 174 Mo. 256; Hooper v. Life & Acc. Co., 166 Mo. App. 209, 148 S. W. ——; Modern Woodmen v. Shryock, 54 Neb. 250; Columbia, etc., Co. v. Ins. Co., 104 Mo. App. 157; Ins. Co. v. Dunlap, 160 Ill.

Digitized by Google

462; Zinc Co. v. Ins. Co., 144 Mo. App. 380; May on Insurance (2 Ed.), sec. 174. (2) A discharge of blood from ear and nostrils of insured, immediately after death from hemorrhage resulting from an accidental fall, constitutes "external and visible marks upon the body" within the requirements of the accident insurance contract sued on. Association v. Barry, 131 U. S. 100, 33 L. R. A. 60; Horsfall v. Ins. Co., 32 Wash. 132, 63 L. R. A. 425; Dent v. Railway Mail Assn., 183 Fed. 840; U. S. Mutual v. Newman, 84 Va. 52. (3) Even on defendant's theory of the measure of proof required, there is ample evidence to support the verdict. Casualty Co. v. Lloyd, 165 Ind. 62; Casualty Co. v. Shields, 155 Fed. 54; Commercial Assn. v. Fulton, 93 Fed. 621; Shonberg v. Fidelity & Casualty Co., 158 Fed. 1; National Benev. Assn. v. Grauman, 107 Ind. 288; Modern Woodmen v. Shryock, 54 Neb. 250; Patterson v. Ocean Acc. & G. Co., 25 App. D. C., ——; Beile v. Protective Assn., 155 Mo. App. 629. (4) Refusal of the trial court to grant a new trial asked for on the ground that the verdict is against the weight of evidence is not reviewable on appeal. Brod v. Transit Co., 115 Mo. App. 202; Louis v. Franckle, 158 Mo. App. 262. (5) The testimony in answer to the hypothetical question was properly admitted. Wigmore, Evidence, secs. 1920, 1921; Rogers, Expert Testimony (2 Ed.), secs. 26-28; Wood v. Railroad, 181 Mo. 433; Moore v. Railroad, 164 Mo. App. 34.

STATEMENT.—John Thomas Goodes, the husband of respondent, a man forty-seven years of age, five feet, nine and a half inches in height, weighing about 210 pounds, robust and apparently free from any disease or ailment, of simple habits, indulging in no excesses in eating or in the use of liquors, using the latter on rare occasions and then very sparingly, a light smoker until within a year and a half before his death, when he discontinued the use of tobacco alto-

Digitized by Google

gether, was on a visit with his wife at the home of a friend. He and his wife retired to their room about midnight and at about eight o'clock in the morning Mr. Goodes, leaving his wife in bed, arose and went to the bathroom to shave and take his bath. He was absent from the bedroom about thirty minutes. Following the testimony of his wife, plaintiff here, it appears that Mr. Goodes, on returning to the bedroom from the bathroom was clad in his pajamas. There was a seat about two feet high, a stool in fact, with four legs, two of them resting on the floor of the bedroom, two on a rug. Mr. Goodes went to this seat, which was in front of a dressing table, sat down and prepared to dress, he and his wife joking, laughing and talking together, she lying in bed. He took off the trousers of his pajamas and reached for his underclothing, a union suit, hanging on the frame of a mirror, which was a few feet in front of this stool, and about four or five feet high. As we understand it, he reached for this garment in a stooping position, not standing up to his full height. Taking the suit off of the post or upright of the cheval, Goodes apparently backed toward the stool and was in the act of reseating himself on it, when it slipped from under him and he fell back on the floor, striking on his buttocks. Hearing him fall, his wife raised up, looked and asked if he was hurt. He said, "No," got up from the floor, came over to the bed, sat down on the side of it, threw off the jacket of his pajamas and reached around for his wife, who was back of him. She then saw that he was hurt. She arose, grabbing hold of him, when his head fell back on her shoulder and she laid him down on the bed and called for help. As she laid him down she saw blood oozing out of his right ear and nose. Some of the people in the house, hearing the cry of Mrs. Goodes, came into the room and when the gentleman of the house reached the body, as he testified, it

Digitized by Google

showed no signs of life, and blood was exuding from one or the other of the ears and from the nose.

A physician, who was summoned and arrived immediately after the occurrence, testified that when he reached the room, he found Mr. Goodes lying on the bed, dead. He had been dead some minutes, was lying on his back, his clothing removed and blood was coming out of the ear and nostril. He recognized the case, as he testified, "as that of hemorrhage."

Some six or seven hours after the death, an autopsy was held on the body. There was testimony tending to show that the examination revealed a hemorrhage in the cavity of the skull around the brain, also hypertrophy of the heart on the right side, and a contracted condition of the kidney. It also showed some of the blood vessels to be atheromatous. There was profuse hemorrhage all through the cranium but more particularly in the ventricles of the lower section of the brain; a slight dilation of the right side of the heart; some change in the kidneys. The atheromatous condition was found in the vessels of the brain; in some of the arteries.

There was testimony to the effect that the hemorrhage from the ear and the nose had resulted from a fracture of the skull. While the surgeons who conducted the autopsy removed the brain, there was no testimony as to any examination of the interior of the skull. In point of fact it appears that the surgeons who conducted the autopsy, made no examination of the interior of the skull with the view of ascertaining whether there had been any fracture. That there had been a fracture and that this had caused the hemorrhage from the ear and nose, was opinion evidence, founded on the evidence as to the hemorrhage. It is proper to say that there was evidence on the part of defendant tending to show that there had been no hemorrhage, certainly that none was observed by those who saw the body immediately after death occurred,

Digitized by Google

either proceeding from the ear or the nostril and, as these witnesses testified, there was no evidence present on the body or about the ears or nose that there had been any such discharge. Other than this hemorrhage, testified to positively by two or more witnesses, no sign of a wound or bruise appeared upon the exterior of the body. There was opinion evidence on the part of defendant, tending to show that the cause of death was apoplexy; that a fall such as that sustained by the deceased, in the absence of a diseased condition of the heart, kidneys and blood vessels in the brain, would not have caused death; that Mr. Goodes was suffering from nephritis, commonly known as Bright's Disease; that a person may have Bright's Disease and go for a considerable length of time before a proper diagnosis is made and the fact discovered and some of them die very suddenly from it without that condition having been previously ascertained; that judging from the condition disclosed at the autopsy, Mr. Goodes had been stricken with apoplexy and that had caused him to slip and fall, and that the fall had not caused or brought on the attack.

To the contrary, there was opinion evidence on the part of the physicians and surgeons examined on the part of plaintiff, in answer to the hypothetical question which was put to them, to the effect that Mr. Goodes died from a concussion and compression of the brain brought about by hemorrhage. The hypothetical question which was asked of these experts, after setting out a description of the subject as to age, weight and height, as to his habits, and that he had been in apparent perfect health, setting out the circumstances connected with the fall, continued: That after reaching the bed as he turns and reaches, his head falling backward, "he sinks down, loses consciousness and falls over, and in a few moments blood oozes from his nostrils, and from his right ear, and after the

Digitized by Google

blood has begun to ooze from the nose and ear all breathing stops and the man is dead; that a post-mortem is held six hours later and on opening the body it appears that the deceased has a granular kidney, not granulated to a great extent, with a heart slightly dilated and the valves thereof not diseased; that he has some arteries in his brain that are atheromatous; that there is a profuse hemorrhage in the ventricles of the brain and extending throughout the brain (or, as modified, 'profuse hemorrhage around the brain'), on that state of facts, what in your opinion caused the death?" The answers of the surgeons called by plaintiff to whom this was propounded were to the effect that the subject of the question died from a concussion and compression of the brain, brought about by a hemorrhage, the hemorrhage proceeding from a fracture at the base of the skull, the fracture caused in the hypothetical case stated, by a fall upon his buttocks. On practically the same hypothetical question, surgeons called by defendant gave it as their opinion that the subject died of apoplexy and that this was not induced by the fall.

At the time of his death John Thomas Goodes was a member of the defendant society or corporation, a corporation organized under the laws of the State of Ohio, engaged in the business of life and accident insurance upon the mutual or co-operative plan, a corporation duly organized to transact business in the State of Missouri, his wife, the plaintiff, respondent here, being the beneficiary. The constitution or laws of the order provides that in case any member of the order shall sustain, during the continuance of his membership and while in good standing, "bodily injury effected through external, violent and accidental means, which alone shall occasion death immediately or within six months from the happening thereof, then the Order of United Commercial Travelers of America, within ninety days from the receipt of satisfactory proof of his death, shall pay to the person or persons en-

Digitized by Google

titled thereto, a sum not exceeding $5000," and also pay the sum of $1300 in weekly installments of twenty-five dollars each. It was provided, among other things, that the payments authorized to be made under this law should not cover or extend to any death, disability or loss resulting from various affections named, among others, fits and vertigo, "nor to any death, disability or loss, of which there shall be no external and visible mark on the body (the dead body not being such a mark except in case of drowning or asphyxiation), or happening directly or indirectly in consequence of disease or caused wholly or in part by bodily infirmities or disease, . . . nor to any case except where the injury is external, accidental, and the proximate and sole cause of the death." There are various other conditions in the constitution and laws of the order besides the above but as the case before us turns upon the construction of these portions, it is not necessary to set out any of the other exceptions.

It may be said in passing that while there was an effort made to show that Mr. Goodes was in default in the payment of some dues to his local lodge, that has practically been abandoned; so also has any question as to due presentation of the claim.

The material parts of the answer, in effect, deny that the death was the result of external, violent and accidental causes, alleging that it occurred within the express exceptions of the constitution which defendant sets out, namely, that the obligation of payment should not cover or extend to any death "happening directly or indirectly in consequence of disease or caused wholly or in part by bodily infirmity or disease, nor to any case except where the injury is external, accidental, and the proximate and sole cause of the death of the deceased member." There are other defenses set up in the answer but they were practically abandoned, the affirmative defenses abandoned either at the trial or before us, these affirma

Digitized by Google

tive averments of the answer, however, being put in issue by a reply.

We have not undertaken to set out the evidence in detail but have given a summary of it which we have taken mainly from the elaborate statement of the learned counsel for appellant, but referring also to the abstract, as it appears on an examination of that, that doubtless by inadvertence, counsel have included some questions and answers that were later excluded by the court; these, on the strength of the abstract, we have disregarded.

At the conclusion of the evidence for plaintiff and again at the conclusion of all the testimony in the case, defendant interposed a demurrer to the evidence. These demurrers were overruled, defendant excepting.

At the instance of plaintiff the court gave two instructions, numbered 1 and 2, and as follows:

"1. If the jury find from the evidence that on the 27th day of December, 1908, John Thomas Goodes was a member in good standing in the defendant corporation and that while in such standing his death occurred, and that the direct cause thereof was bodily injury effected through external, violent and accidental means, alone, independent of all other causes, within six months of the happening of such accident, and that such death did not happen directly or indirectly in consequence of disease and was not caused wholly or in part by bodily infirmity or disease, and that there were external and visible evidences or marks of such accident on the body of the deceased, and that the defendant, after notice of said death and presentation of claim, disclaimed all liability on other grounds than want of sufficient proofs of death, then plaintiff is entitled to recover the sum of $6300 with interest thereon from the 22d day of June, 1909, to this date, at the rate of six per cent per annum.

"2. If the jury find from the evidence that John Thomas Goodes accidentally slipped and fell from a

Digitized by Google

stool and that such fall was the direct cause of a bursting of the blood vessels in the brain which resulted in his death, then the fall was the direct cause of death, notwithstanding the jury may find that said Goodes was suffering from diseased arteries, heart and kidneys."

At the instance of defendant the court gave two instructions, number 3 and 4, as follows:

"3. The court instructs the jury that the plaintiff is not entitled to recover in this action unless the said John Thomas Goodes came to his death on or about the 27th day of December, 1908, as the result of external, violent and accidental means, alone, independent of all other causes, and the burden of proof is upon the plaintiff to establish to the satisfaction of the jury that the death was caused by external, violent and accidental means alone, independent of all other causes; and unless you believe that the plaintiff has established by a preponderance of the testimony that the death of said Goodes was caused by external, violent and accidental means, alone, independent of all other causes, that then your verdict must be in favor of the defendant.

"4. The court instructs the jury if they find from the evidence that John Thomas Goodes did slip, fall or wrench his body in any way, and that such occurrence was caused by apoplexy or a cerebral hemorrhage brought on by a diseased condition of his arteries, the plaintiff cannot recover."

Of its own motion the court gave an instruction numbered 5, that before the jury could find the issues for plaintiff, "they must find that the alleged accident to Mr. Goodes, that is to say his falling to the floor while attempting to sit down upon a dressing seat, was the direct and efficient cause of the death of the insured."

Digitized by Google

The court also correctly instructed the jury as to the credibility of witnesses and as to the number of jurors necessary to concur in a verdict.

The defendant asked eight instructions which were refused. The substance of these refused instructions is that if the jury found that the decedent, John Thomas Goodes, slipped, fell or wrenched his bodily while suffering from a diseased condition of the arteries which existed prior thereto, and that his death would not have resulted from such slipping, falling or wrenching of his body in the absence of such diseased condition, or that the diseased condition aggravated the effects of the accident and contributed to his death, then plaintiff could not recover; that the contract of the defendant order provides that it shall not be liable for any death happening directly or indirectly in consequence of disease or caused wholly or in part by bodily infirmities or disease, and that even if the jury found from the evidence that Goodes slipped and fell or wrenched himself, if they found from the evidence that he had a diseased condition of the arteries and that that diseased condition aggravated the effects of the accident and contributed to his death, then by the express terms of the contract there was no liability on the part of the defendant; that if they found that Goodes suffered an accident and died as a result of a ruptured artery in the brain and that at and prior to the date of the accident he had a diseased condition of the arteries and that the accident was not of sufficient force and violence to cause a fatal rupture of the arteries in the absence of such diseased condition, plaintiff could not recover, and their verdict should be for defendant. Other instructions were asked as to the binding effects of the proofs of death submitted and as to the standing of John Thomas Goodes in the order, but as no point is made in the assignment of errors on the refusal of these or on these issues, it is unnecessary to notice them.

Digitized by Google

The jury returned a verdict for plaintiff in the sum of $7003.50. Interposing a motion for new trial and one in arrest and saving exceptions to the overruling of these motions, defendant has duly perfected its appeal to this court.

REYNOLDS, P. J. (after stating the facts).—The only questions before us for determination are as to the sufficiency of the evidence in the case to sustain a verdict; the correctness of the ruling of the trial court in overruling demurrers at the close of plaintiff's case and at the close of all the evidence in the case; objection to the testimony of certain expert witnesses called by plaintiff, and to the form of the hypothetical question asked by plaintiff; to the verdict, as based upon presumptions upon presumptions and inferences upon inferences; to the giving of plaintiff's second instruction; to giving the instruction number 5 of the court's own motion; to refusing instructions asked by defendant.

Disposing of the error assigned as to the correctness of the hypothetical question and the answers to it, we find no error in the question, nor do we think that the contention of the learned counsel for appellant, that the question and answers had a tendency to substitute the opinions and conclusions of the surgeons for the verdict of the jury, is sound. We do not agree with the learned counsel that the answers were mere conclusions, in the technical sense of that word. They constituted opinion evidence in the true sense of of that term and were the very kind of evidence that the use of expert witnesses is intended to and should adduce.

Counsel argue that expert witnesses "may not usurp the functions of the jury, nor be permitted, in answering hypothetical questions, to state what, in their opinion, was the cause of the death of insured." This is only partially correct. One of the functions,

Digitized by Google

in fact the only function of an expert witness, is to give his opinion of the cause of death, basing that on the hypothetical case.

We are very much inclined to agree with Mr. Wigmore (3 Wigmore on Evidence, secs. 1920-1922, inclusive) in his criticism of the use of the phrase, "usurping the function of the jury," and of the kindred phrase, "that an opinion can never be received when it touches 'the very issue before the jury,'" the latter stated in the form that "it is a general rule that a witness cannot be allowed to express an opinion upon the exact question which the jury are required to decide." It can hardly be said that the opinion evidence of experts usurps the function of the jury, for even without a specific instruction to that effect, any ordinarily intelligent jury understands that "opinion evidence," while intended to advise the lay mind, is advisory only and not binding. Nor does "opinion evidence" in any case, *determine* the issue; it is not entered as of the verdict nor as the judgment of the court. So that it is a little difficult to understand how it can ever be said to usurp the function of the jury. In the case at bar, we find no infringement of the rule as to the admission of opinion evidence. To the contrary we are of the opinion that the rules governing such testimony, as laid down by our Supreme Court in Wood v. Metropolitan Street Ry. Co., 181 Mo. 433, 81 S. W. 152; Taylor v. Grand Ave. Ry. Co., 185 Mo. 239, 84 S. W. 873; State v. Hyde, 234 Mo. 200, 136 S. W. 316, and by the Kansas City Court of Appeals in Thomas v. Metropolitan St. R. Co., 125 Mo. App. 131, 100 S. W. 1121; Holtzen v. Missouri Pac. Ry. Co., 159 Mo. App. 370, 140 S. W. 767, and Moore, Admr., v. Missouri Pac. Ry. Co., 164 Mo. App. 34, 147 S. W. 488, were observed.

Turning to the demurrers to the evidence, we have to say as to the action of the trial court in overruling these demurrers, that unless it is to be held as a mat-

Digitized by Google

ter of law that the fact that John Thomas Goodes had a diseased body which rendered him more susceptible to accident, or which would make a slight fall produce fatal results, bars recovery, a proposition which we will take up later, there can be no question whatever that there was testimony of a very substantial kind warranting the jury in finding that the death was the result of external injuries alone, received in, the result of, an accident. All the authorities, even those cited by counsel for appellant and hereafter referred to on other points, hold that where the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant, otherwise, the case is for the jury. See Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478, where that rule is well and concisely stated. It cannot be pretended in the case at bar that the evidence was so clearly all one way on this issue, that there could be no difference as to its effect in the minds of reasonable men. The whole conduct of the defense, in its line of pleading and at the trial, negatives any such conclusion. The demurrers were properly overruled.

This brings us to a consideration of the instructions. No error is assigned on the first instruction given at the instance of plaintiff, nevertheless we have set it out in full, as the instructions given, as well as the action of the trial court in refusing others, are, generally, necessarily to be considered in arriving at a full understanding of the case. The errors assigned are to the second instruction given at the instance of plaintiff, to the fifth given by the court of its own motion, and to the action of the court in refusing certain instructions asked by defendant.

It will be noticed that the first instruction given covers the whole case and squarely meets the issue ten-

Digitized by Google

dered by the learned counsel for defendant, namely, that plaintiff is entitled to recover if the jury found that the fall was the direct cause of the bursting of the blood vessel in the brain which resulted in the death of John Thomas Goodes, but that plaintiff could not recover if death happened directly or indirectly in consequence of disease. The second instruction given at the instance of plaintiff puts this matter in a more concrete form. "If," says the court, "such fall was the direct cause of a bursting of the blood vessels in the brain which resulted in his death, then the fall was the direct cause of death, notwithstanding the jury may find that said Goodes was suffering from diseased arteries, heart and kidneys." This presents the issue and covers the defense interposed in the most distinct and sharpest manner possible and is in direct negation of all the instructions asked by defendant and refused by the court. If this instruction, in connection with the first given at the instance of plaintiff, is correct, then none of the instructions asked by defendant should have been given. They presented a diametrically opposite theory. Hence the issue and the determination of this case depends upon the determination of the correctness of these instructions in connection with the others which were given. If these instructions and the fifth, given by the court, are correct, the verdict must stand; if incorrect, then there should be a reversal.

Before taking up the discussion of this proposition, however, it is as well to say that we concede that the burthen of proof was on plaintiff below to show that the death of the insured was caused by bodily injury effected through external, violent and accidental means, and that this alone caused his death. We further concede that it is not permissible in a court of law "to base presumptions upon presumptions and inferences upon inferences." The first instruction which the court gave to the jury at the instance of plaintiff

Digitized by Google

recognized the first proposition in unmistakable terms, and, as before remarked, no complaint is made of this instruction. We are unable to agree that in the case at bar the jury, in arriving at its verdict, were compelled "to base presumptions upon presumptions and inferences upon inferences." The jury were proceeding upon neither presumptions nor inferences but upon affirmative, positive testimony, distinctly laying before them the facts connected with the accident, connected with the death of John Thomas Goodes, and it was unnecessary for them to indulge in either inference or presumption and we have no reason to assume that they acted on either. This does not mean that the jury did not have the right to, and did not draw any and all proper inferences which the facts in evidence warranted. That is always within their province.

It is further claimed that where the evidence is as consistent with the cause of death not accidental as with an accidental cause, the verdict should be for the defendant. Whatever force there may be in this aphorism, we are unable to appreciate its application to the case at bar. The jury were told in plain and unmistakable terms by the first and practically in the second instruction given at the instance of plaintiff, as well as those given for the defendant, that before they could find for plaintiff they must find from the evidence in the case that John Thomas Goodes came to his death while a member of the order in good standing "and that the direct cause thereof was bodily injury effected through external, violent and accidental means, alone, independent of all other causes, . . . and that such death did not happen directly or indirectly in consequence of disease and was not caused wholly or in part by bodily infirmity or disease, and that there were external and visible evidences or marks of such accident on the body of the deceased;" that they must further find from the evidence that "John

Digitized by Google

Thomas Goodes accidentally slipped and fell from a stool and that such fall was the direct cause of a bursting of the blood vessels in the brain which resulted in his death," the court telling the jury in the second instruction that if he fell and burst a blood vessel, "then the fall was the direct cause of death, notwithstanding the jury may find that said Goodes was suffering from diseased arteries, heart and kidneys." It is difficult to understand how the court could have put more plainly to the jury the proposition that they were to determine that the accident was the sole, direct and proximate cause of the death of John Thomas Goodes. There is no confusion here; no diverting of the minds of the jurors. They were told distinctly that unless the accident was the direct cause of the death there could be no recovery, and that if his fall "was caused by apoplexy or a cerebral hemorrhage brought on by a diseased condition of his arteries, the plaintiff cannot recover."

They were further told by the first instruction that they must find that there were external or visible evidences of accident or marks on the body of the deceased. That is a correct proposition, as will be seen by reference to United States Mutual Accident Assn. v. Barry, 131 U. S. 100, l. c. 111, and United States Mutual Accident Assn. v. Newman, 84 Va. 52, l. c. 56, as well as in other cases cited by counsel. In the Barry case, supra, the district judge who tried the case, in charging the jury, said: "Visible signs of injury, within the meaning of this certificate, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign, because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see, but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching, or bloody

Digitized by Google

or unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury." This part of the charge was approved by the Supreme Court.

There was direct evidence in the case at bar, contradicted it is true, that blood issued from the ear and nostril of the deceased. That was a visible sign.

With these incidental propositions, as we may call them, disposed of, we return to the consideration of that involved in the giving of the second instruction at the instance of plaintiff and the fifth given by the court of its own motion, and the refusal of the instructions asked by defendant, which, in brief, as before stated, presents the question as to the propriety of the jury taking into consideration the diseased condition of the arteries, heart and kidneys of John Thomas Goodes in arriving at the determination of the question as to whether the fall was the direct cause of his death.

In support of their contention that but for the diseased condition of his body the accident would not have caused the death of John Thomas Goodes and that if that was so there could be no recovery, we are cited by the learned counsel for appellant to the cases of National Masonic Accident Assn. v. Shryock, 73 Fed. 774; Travelers' Ins. Co. v. Selden, 78 Fed. 285; Commercial Travelers' Mut. Accident Assn. v. Fulton, 79 Fed. 423; Hubbard v. Mut. Accident Assn., 98 Fed. 930. We are also cited by these counsel to Carr v. Pacific Mut. Life Ins. Co., 100 Mo. App. 602, 75 S. W. 180 and Fetter v. Fidelity & Casualty Co., 174 Mo. 256, 73 S. W. 592, in addition to these cases, in support of the proposition that when the violence of the injury was not alone sufficient to account for death, and the existence of the disease is an essential factor in the fatal result, plaintiff is not entitled to recover under

Digitized by Google

the terms of the contract involved in this case. Western Commercial Travelers' Assn. v. Smith, 85 Fed. 401, is also cited. It is true that the Kansas City Court of Appeals, in Carr v. Pacific Mut. Life Ins. Co., supra, did hold, following Commercial Travelers' Mut. Accident Assn. v. Fulton, supra, that under a policy of accident insurance which provides that it shall not extend to or cover accidental injuries or death resulting from or caused directly or indirectly, wholly or in part, by disease in any form, there can be no recovery for the death of the insured if he had a disease but for which death would not have resulted from the accident. The Kansas City Court of Appeals further cites in support of this National Masonic Accident Assn. v. Shryock, supra, and other cases which so decide, notably Travelers' Ins. Co. v. Selden, supra; Commercial Travelers' Mut. Accident Assn. v. Fulton, supra; and Hubbard v. Mut. Accident Assn., supra.

The opinion in the Carr case, supra, was handed down June 8, 1903. Two months before that, namely, on April 1, 1903, our Supreme Court handed down its opinion in Fetter v. Fidelity & Casualty Co., supra. It is not referred to in the Carr case and in all probability was not called to the attention of the Kansas City Court of Appeals when it handed down its decision in the Carr case, affirmed in Strode v. St. Louis Transit Co., 197 Mo. 616, l. c. 621, 95 S. W. 851. We think that the decision in the Fetter case is contrary to that of the Kansas City Court of Appeals in the Carr case, and as we shall hereafter show, does not sustain but is adverse to the claim of appellant. We had occasion to consider the Fetter case in the case of Beile v. Travelers' Protective Assn., 155 Mo. App. 629, 135 S. W. 497. In the Beile case we held, in effect, that the policy in question excepted from its provisions of indemnity death caused wholly or in part by bodily or mental infirmity or disease. This language we held means nothing more than

Digitized by Google

that the plaintiff, to recover, was only bound to prove that the accident and not the infirmity with which the insured was afflicted, was the proximate cause of death. In the Beile case we referred to and quoted approvingly Driskell v. United States Health & Accident Ins. Co., 117 Mo. App. 362, 93 S. W. 880. There the policy provided, in effect, that it was payable only and in case death should result solely from external injuries, and it was said, and this we quoted approvingly in the Beile case (l. c. 646) that "the only reasonable interpretation to be placed upon this clause is to say that the injury must stand out as the predominant factor in the production of the result and not that it must have been so virulent in character as necessarily and inevitably to have produced that result, regardless of all other conditions and circumstances. . . . When evidence is introduced that points to the injury as the sole active force that brings into operation death-producing agencies, the issue of the proximate cause is one of fact for the jury and not of law for the court." That our brethren of the Kansas City Court of Appeals fell in line with what we understand to be the decision of our Supreme Court in the Fetter case, seems very clear from a consideration of the decision of that court in Hooper v. Standard Life & Accident Ins. Co., 166 Mo. App. 209, 148 S. W. 116. In that case the trial court instructed the jury that if they found and believed from the evidence that Hooper was stricken with apoplexy while riding in the street car and that he was so stricken either while sitting in a seat or in an attempt to arise therefrom, and that such apoplexy caused his death, then it was the duty of the jury to return a verdict in favor of defendant, and that if the jury should believe from the evidence that the death of Mr. Hooper was caused by apoplexy resulting from a diseased condition of his body, it was their duty to return a verdict in favor of defendant, "*regardless of all other questions in the case.*" These

Digitized by Google

dence of defendant it might appear that the deceased had died from apoplexy caused by a diseased condition, that is that he would not have died but for that condition and therefore under the terms of the instruction the verdict must be for defendant, yet the evidence for plaintiff was to the effect that if the accident of his falling had not happened he would not have been stricken with apoplexy. So that "the effect of the instruction" (given at the instance of defendant), says Judge ELLISON, "was to cut out plaintiff's theory of her case; especially when there was added (by the court) the words (to the fourth instruction) 'regardless of all other questions in the case.'" It is clear, we think, that the Kansas City Court of Appeals has here greatly modified the view taken in the Carr case by this decision in the Hooper case.

The leading case sustaining the position taken by counsel for appellant here is that of National Masonic Accident Assn. v. Shryock, supra, hereafter referred to as the Shryock case. In that case it is said that under an accident policy, practically with like conditions as in the case before us, the insurer would not be liable, if at the time of the accident, the insured was suffering from a pre-existing disease, and death would not have resulted from the accident in the absence of such disease, but that the insured had died because the accident aggravated the effect of the disease or the disease aggravated the effects of the accident. "The death," says Judge SANBORN, who delivered the opinion, "in such a case would not be the result of the accident alone, but it would be caused partly by the disease and partly by the accident, and the contract exempted the association from liability therefor." Several cases are cited by the learned circuit judge in support of this proposition. Following this are the Federal decisions which we have above referred to as relied upon by counsel for appellant, namely, Travelers' Ins. Co. v. Selden, supra; Com-

Digitized by Google

mercial Travelers' Mutual Accident Assn. v. Fulton, supra; Western Commercial Travelers' Assn. v. Smith, supra; and Hubbard v. Mutual Accident Assn., supra.

Travelers' Ins. Co. v. Selden, supra, while referring to the Shryock case, supra, can hardly be said to be applicable, as the undisputed evidence of the case, even that on the part of plaintiff there, who was defendant in error, showed that the death was the result of apoplexy, and there was no evidence tending to show that the deceased had been injured through any external, violent or accidental means whatever. On this showing the circuit court of appeals very properly held that the trial court should have directed the jury to find for the defendant on the rule announced by Mr. Justice GRAY in Randall v. Baltimore & Ohio Railroad Co., supra. What is said in this Selden case about the Shryock case, supra, therefore, was outside of the decision.

Commercial Travelers' Mutual Accident Assn. v. Fulton, supra, it may be conceded, practically adopts the view previously expressed by Judge SANBORN in the Shryock case.

Western Commercial Travelers' Assn. v. Smith, supra, while adopting the view expressed in the Shryock case on the above point, resulted in favor of the plaintiff below.

Hubbard v. Mutual Accident Assn., supra, a decision by a district judge holding circuit court, follows the Shryock case on this proposition.

It has been said in criticism of the Shryock case, supra, that this particular part of it is obiter in that case. However that may be, it undoubtedly has been followed in other cases by the Federal courts. It was cited by the Kansas City Court of Appeals in the Carr case, supra, approvingly. It was called to the attention of our Supreme Court in the Fetter case by counsel who represented the appellant in that case, but

Digitized by Google

while not referred to by name by our Supreme Court in its opinion in the Fetter case, obviously was not accepted.

On practically a like policy or certificate of membership as that involved in the Shryock case, which had been before the United States Circuit Court of Appeals, and involving the same accident and to the same individual the question which had been before the Federal court came before the Supreme Court of Nsbraska, in the case of Modern Woodmen Accident Assn. v. Shryock, 54 Neb. 250, hereafter referred to as the Modern Woodmen case. Both policies or certificates were issued in Nebraska and were Nebraska contracts. In the Modern Woodmen case, referring to the Shryock case, the Supreme Court of Nebraska, on careful considèration and examination of the authorities cited by Judge SANBORN in support of his views, explicitly refused to follow him on the proposition here involved, analyzing the cases cited by Judge SANBORN and citing many authorities, not only from the reports of the State of Nebraska but elsewhere in support of the contrary view. In the Modern Woodmen case, following the practice in Nebraska, the trial court had submitted certain special interrogatories to the jury which the jury were required to answer. The first interrogatory is, Did Shryock, on the day named, meet with an accident in the city of Omaha, whereby he received external and violent bodily injury? To this the jury returned the answer, "Yes." Second. Did Shryock, prior to and at the time of his death, have fatty degeneration of the heart? The jury answered, "Yes." Third. "If you answer that William B. Shryock received an accidental, external, and violent bodily injury, did that injury alone cause his death?" The jury answered, "Yes." Fourth. "If you answer that William B. Shryock, prior to and at the time of his death, had fatty degeneration of the heart, did that disease alone cause his death?" The

Digitized by Google

instructions are held by the Kansas City Court of Appeals to have been erroneous; that while from the evijury answered, "No." Fifth. "What was the cause of the death of William B. Shryock?" The jury answered, "By violent bodily injury, he at the time having fatty degeneration of the heart."

There was a verdict for the plaintiff Shryock and it was from the judgment on this the appeal was taken to the Supreme Court of Nebraska. Entirely disagreeing with the conclusion arrived at by the United States Circuit Court of Appeals in the Shryock case, on a like certificate and the same accidental death, the conclusion arrived at by the Supreme Court of Nebraska was that whether an accident or a disease caused the death of a party whose life was insured against death by accident, was the sole question which should be submitted to and determined by a jury; unless with reference to that proposition the proofs are so convincing that all reasonable men, in the fair exercise of their judgment, would be brought to adopt the same conclusion. In other words, the conclusion of the Supreme Court of Nebraska is that the fact that at the time of sustaining the accident the deceased may have had other diseases, does not bar a recovery, if the accident in itself, and not these diseases, was the sole cause of the death. We refer to this decision of the Supreme Court of Nebraska without further quotation, as a sufficient answer, in our minds, to the argument advanced in the United States Circuit Court of Appeals in the Shryock case. While we are not bound or controlled by the decisions of either of these courts, we recognize them as composed of judges of great ability, and as between them we accept that of the Supreme Court of Nebraska as in harmony with the decisions of our own courts as expressed in the cases heretofore cited, particularly with the decision of our Supreme Court in the Fetter case, supra. In this latter case Judge VALLIANT, who delivered the opinion,

Digitized by Google

holds that where it is agreed in an accident policy to pay in case the injuries resulted in the death of the insured and it appears that they are sustained through external, violent and accidental means, independent of all other causes, the causes meant are the proximate or direct, not the remote causes; such a policy meaning that the accident must be the sole and only direct cause of the insured's death, and does not mean that the beneficiaries cannot recover, if the accident hastened on or accelerated some hidden or hitherto concealed disease so as to cause death, or if the accident superinduced or generated a disease which caused his death.

It is not out of the way to call attention to the fact that this same view, entertained by our Supreme Court and announced in the Fetter case, and by our court in the Driskell and Beile cases, supra, has not only the support of the decision of the Supreme Court of Nebraska in the Modern Woodmen case, supra, but finds support in at least two decisions of the English courts. One of these is by its Court of Appeals in the case of Winspear v. The Accident Insurance Co., Limited, 6 Q. B. Div. Law Reports (1880-1881), 42. It appears, as stated by Lord Chief Justice COLERIDGE, that the insured died from drowning in the waters of a brook into which he fell whilst in an epileptic fit. Drowning, says the learned chief justice, within the meaning of the policy, is a death "by accidental, external and visible means." "I am therefore of opinion," says the chief justice, "that the injury from which he died was a risk covered by this policy, and the only question then remaining is whether the case is within the proviso which provides that the insurance 'shall not extend to death by suicide, whether felonious or otherwise, or to any injury caused by or arising from natural disease, or weakness or exhaustion consequent upon disease.' It is certainly not within the first part of this proviso, because the death was not so occasioned, neither does it appear to me that the cause of the

Digitized by Google

death was within those latter words of the proviso. The death was not caused by any natural disease or weakness or exhaustion consequent upon disease, but by the accident of drowning. I am of opinion that these words in the proviso mean what they say, and that they point to an injury caused by natural disease, as if for instance in the present case, epilepsy had really been the cause of the death. The death, however, did not arise from any such cause, and those words have no application to the case, and therefore the judgment of the Exchequer Division must be affirmed."

The other English case is Lawrence v. Accidental Insurance Co., 7 Q. B. Div. Law Reports (1880-1881), 216, a case in which the insured, while at a railway station, was seized with a fit and fell forwards off the platform across the railway, when an engine and cars which were passing went over his body and killed him. The Queen's Bench Division, Lord COLERIDGE, Chief Justice, presiding, held that the death of the insured was caused by an accident within the meaning of the policy and that the insurers were liable. The principal opinion was delivered by Mr. Justice DENMAN. Mr. Justice WILLIAMS, in a concurring opinion, refers to the well known maxim of Lord BACON which, as Mr. Justice WILLIAMS says, "is applicable to all departments of the law," and directly applicable to the case before the court. He quotes Lord BACON's language in his Maxims of the Law, Reg. 1, as running thus: "It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause." Applying this, Mr. Justice WILLIAMS says that according to the true principles of law we are to look at only the immediate and proximate cause of death, "and it seems to me to be impracticable to go back to cause upon cause, which would lead us back ultimately to the birth of the person, for if he had never been born the accident would not have happened."

Digitized by Google

It will be observed that the questions submitted in the Modern Woodmen case, calling for special findings by the jury, practically put the case before the jury in the exact light and on the same issue that the trial court in the case at bar put this case by the instructions given. It follows that it would have been error to have given any of the instructions asked by defendant, appellant here, and which we have set out as refused. They were properly refused as submitting to the jury a case not within the terms of the policy.

It is to be remembered in cases of accident insurance, no physical examination is made, no warranties of health required or given. Certainly none appear to have been in the case before us. There is no pretense of warranties of health or physical condition having been exacted from the insured. He was accepted as a risk in the condition in which the company found him at the time, with the explicit provision, however, that to make the company liable, the death must result solely from accident. It cannot be successfully argued, as is here in effect attempted, that any distinction is to be made or exemption claimed because the subject of the accident was more liable to die from accident, being in one physical condition or in another. We all know, it is a matter of common experience and common knowledge, that if a young man twenty-five years of age breaks a limb the broken limb knits much more rapidly and completely in a man at that age than in one of the age of fifty years. Men 70 years of age or over are not usually insured by accident companies. Parallels might be run indefinitely in this line. Injury to a perfectly healthy man is never as apt to result fatally as in the case of a man who is weakened by disease, or where one man is much stronger, physically, than another.

While there was testimony from surgeons called by the defendant, to the effect that in their opinion Mr. Goodes died of apoplexy and not from the effects

Digitized by Google

of the fall, none of them would be held to give it as an opinion that death would have occurred when it did but for the fall. That must be so, for who, expert or layman, whose opinion would be of any probative force, could be accepted as giving testimony of any value, if, with the facts developed by the autopsy, he should undertake to say that any of the ascertained conditions would—absent the accident—have produced the death at this time. Men have lived for many years with Bright's Disease, impaired arteries, unsound heart, diseased conditions far more advanced than here found. So that, at the end, we must face this question, Did Mr. Goodes die from disease present in his system, or from the accident? If from the disease, there would be no liability; if from the accident, liability was imposed. This was the question submitted to the jury by proper instructions. It was for them to answer it under the evidence. They answered it in favor of the plaintiff.

If this company had wished to place its risk on the line of health or physical condition, or age, it should have done so in its contract; its rates would probably have been adjusted accordingly. It did nothing of the kind. It expressly contracted that it would not pay if the death was the result of disease; it expressly contracted to pay if death resulted solely from external accident. That was the issue that was fairly submitted to the jury in this case, submitted in such distinct terms by the instructions given at the instance of plaintiff and defendant, that it was impossible for them to have erred as to the law given them by the court. Under those instructions, warranted by the law and the evidence, their verdict is conclusive upon us.

We see no error in the conduct of the trial, either as to the admission of testimony or the giving or refusal of instructions.

The judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

Digitized by Google

STATE OF MISSOURI ex rel. JACOB M. WATTENBARGER, Guardian, Relator, v. FRED LAMB, Judge of the Circuit Court of Sullivan County, Respondent.

Kansas City Court of Appeals, June 30, 1913.

1. **EXECUTORS AND ADMINISTRATORS: Guardian: Distribution: Pleading: Directions: Mandate.** The executor of an estate paid several special legacies directed by the testator, and distributed $5000 to each of the residuary legatees, children of the testator, except a minor child. Her guardian filed a petition in the probate court setting up those payments; and settlements of the executor showing large cash balances in the hands of the executor; and that his ward was the only child and heir of one of the residuary legatees, and that he had died a few weeks before his father, the testator; and that the child took from her grandfather, a share equal to the shares of the other residuary legatees. The executor filed an answer to this petition, in which he did not deny any of the allegations therein, and set up as the sole reason why the child was not entitled to a distributive share that her father was indebted to her grandfather, the testator, in a sum larger than her distributive share would have been, and her taking from her grandfather was through her father and subject to the latter's debt to her grandfather. The probate court and the circuit court, on appeal, adopted that view; but on appeal to the Court of Appeals, the judgment of the circuit court was reversed and the cause remanded "with directions to find for the plaintiff the sum shown to be due." It was *held* that such directions required the circuit court to enter judgment for $5000 and interest, as being the sum shown by the record to be due; and that an inquiry by such court, or the probate court, was not proper.

2. **PLEADING: Appeal and Error: Reversing With Directions.** When an answer in a cause admits or concedes a certain sum to be due the plaintiff and that concession pervades the entire record and, on appeal, the appellate court remands the cause "with directions to find for the plaintiff the sum shown to be due," such direction does not mean the sum shown to be due by another investigation, but the sum shown to be due by the record.

3. **———: ———: Denial: Sole Cause: Confession and Avoidance: Admission.** An answer which does not deny the allega-

Digitized by Google

tions of a petition showing plaintiff to be entitled to a distributive share of an estate, but sets up a certain sole and only cause why the plaintiff is barred of that right, is a plea in the nature of a confession and avoidance, and the avoidance failing, the confession stands. Such plea is a tacit admission of the claim, but for the special matter interposed.

4. **APPEAL AND ERROR: Reversal and Remanding: Authority.** When, on appeal, a judgment is reversed and the cause remanded with directions, the trial court has no authority to perform any other function than that directed, and it is improper for him to enter into an investigation of the matter litigated.

5. **EXECUTORS AND ADMINISTRATORS: Settlements: Distributees: Payments.** Where an executor by his several settlements showed a large cash balance in favor of the estate and showed that he had paid all residuary legatees but one, $5000 cash, as a first distribution, he will not be allowed to defeat a judgment and order that he pay that one her distributive share, by showing that such settlements were false in that he had paid the other distributees' shares by conveying land to the distributees, and that he had no cash as reported in his settlements.

6. **MANDAMUS: Appeal: Specific Judgment.** Mandamus will not be allowed to perform the office of an appeal and when there is a complete remedy by appeal the writ should be denied. But this rule presupposes there is a matter in question which is the proper subject of litigation. It does not apply to an instance where the circuit court refuses to obey the directions of a mandate to enter a specific judgment, as in such case the remedy is mandamus.

7. **———: ———: Alternative Writ: Amendment.** If the alternative writ asks for more than can be given by the peremptory writ, the latter should not be granted. Though in such case an amendment might be made.

Mandamus, Original Proceeding.

PEREMPTORY WRIT AWARDED.

J. M. Wattenbarger, Calfee & Painter, E. M. Harber for relator.

A. W. Mullins and *D. M. Wilson* for respondent.

Digitized by Google

ELLISON, P. J.—This is an original proceeding in this court whereby relator seeks, through our writ of mandamus, to compel respondent, as judge of the circuit court of Sullivan county, Missouri, to obey the mandate of this court issued in the cause of Wattenbarger v. Payne, reported in 162 Mo. App. 434. An alternative writ was issued and return thereto has been made. Relator, concluding that the return presented no defense to the alternative writ, has filed a motion for judgment that the writ be made peremptory.

The immediate question before us arose on relator's motion or suggestion in the circuit court to carry out the mandate of this court. The return discloses clearly the theory which has governed the action of the trial court throughout the proceedings. The order of this court, when the judgment was rendered was that the judgment of the circuit court would be reversed and the cause remanded to that court with directions to it "to find for the plaintiff the sum shown to be due" him as such guardian. The return shows a refusal to obey this direction and the reasons entertained in justification of the refusal. The reasons may be said to be two in number—one that this court did not determine that any sum was due the guardian—that it merely determined that she was entitled to the legacy left to her father, discharged of his indebtedness to the grandfather. The other was that it could not determine or pass upon the amount due relator, since the estate was yet in course of administration and the probate court was the only court which could carry out the mandate of this court and therefore it (the circuit court) ordered the case transferred back to the probate court with directions to the latter court "to ascertain the condition of the estate, and find exactly what is the amount due this child and then enter judgment for it."

The return shows that that court refused to follow the directions of the circuit court and that it proceeded

Digitized by Google

to make an order in the premises from which the executor appealed to the circuit court. On this appeal evidence on part of the relator was heard, consisting of the original petition of the guardian in the probate court asking that the executor be required to pay him for his ward five thousand dollars, being the amount he had paid the other legatees; and the executor's answer to such petition; as well as the several settlements of the executor, together with the mandate of this court.

The evidence on the part of the executor was the will and his oral testimony. The return further showed that the court found the evidence of the executor was true and that it was not affected by the pleadings in the cause and the several settlements made by the executor. The court considered that the petition and answer upon which the cause had been heard originally by the probate court and then, successively, on appeal, by the circuit court and this court, were not a concession that five thousand dollars was due relator's ward if she was not cut out by the indebtedness of her father to her grandfather. The court further found, as stated by the executor in his testimony, that he had not cash funds of the estate to exceed $150, and that the large balances shown in favor of the estate in his settlements were not cash, but were "notes and property."

The return then sets up a colloquy between the court and counsel immediately following the overruling of the motion, in which the court stated that in its opinion the probate court should ascertain what was due relator's ward and compel a settlement of the estate. Then counsel for relator said, "There can be no question under directions of the Court of Appeals but what this ward should have been paid $5000." The court answered: "The opinion may have been written on that assumption, but that wasn't the question presented, that wasn't the question being argued and

Digitized by Google

that question was not, as I find from the record, directed to the attention of the court. If that was the basis for the directions to this court, why then it was without proper foundation, because the record doesn't show any ascertainment as to the amount. If this case had been tried in the probate court and that court had found the amount due and that appeal was brought here," etc.

The circuit court then again refused to follow the directions contained in the mandate of this court and again ordered the case transferred to the probate court; whereupon relator, in behalf of his ward, instituted this proceeding.

It will be observed from the foregoing that the respondent, as judge of the circuit court, did not consider the right of relator's ward to the sum of $5000 had been adjudicated by this court; and as it had not he, as such circuit court, could not do so, since that, in his opinion, was the province of the probate court. We have therefore undertaken to inquire if there is a sound basis for that view. And first we will remark the total misunderstanding of the directions of this court. We did not cast upon the trial court the duty to try and to determine what sum was due relator's ward. That had clearly appeared from the start and as the trial court had found against her we reversed the judgment and directed that it find for her in the sum which had been confessed to be due her.

When relator's appeal from the probate court to the circuit court was heard by the latter, it could and should have rendered any judgment on that appeal which the probate court could and should have rendered; and failing in that, this court, in the exercise of appellate authority, could direct it to do so. What the judgment of the probate court should have been, under the law that the child took the legacy of her father without being charged with her father's debt to the testator, is made quite plain by the pleadings of

Digitized by Google

the parties. Relator's petition was filed in the probate court after the executor's second annual settlement had been made in which was shown partial distribution of the estate to the legatees in the will aggregating $28,189, of which, after paying all the special legacies, $5000 each was distributed to the children of the testator except this child's deceased father and a part of the share due Mrs. Kelly, a daughter, the balance of which the executor paid on the request of her attorney; and showing a net balance due the estate of $19,136.68, after taking credit for $2472.80 as five per cent commission on a total of over $49,000 appearing by such settlement to have passed through his hands up to that time. The petition, after proper allegation of the will and of relator's ward being the only child and heir of Daniel S. Payne, one of the testator's children and equal residuary legatee with the other children, and that he died a few weeks prior to the testator and that she (the ward) in consequence took from her grandfather (the testator) a share equal to that of the remaining children as residuary legatees, alleged the distribution to the others as set forth in the settlement and that she was entitled to a distributive amount equal to theirs, but that the executor refused to pay her. The prayer of the petition was as follows: "Wherefore, this curator moves the court to order and direct said executor, Reuben Payne, to distribute and pay over to this curator, for the use and benefit of this ward, the said Ruth I. Payne, the sum of five thousand dollars and such other and further sum or sums as may be due her as legatee aforesaid, and for all proper orders in the premises."

The answer to this petition was in the following words:

"Reuben Payne, executor of the will of Addison Payne, for his answer to the petition and motion of J. M. Wattenbarger, curator of Ruth I. Payne, for partial distribution, says that said curator is not at

Digitized by Google

this time entitled to the sum of $5000, nor to any sum whatever. For that because the said Ruth takes not by inheritance of her grandfather, the said Addison, seeing that he died testate, but by virtue of the statutes in such cases made and provided, takes the estate that her father, Daniel S. Payne, a devisee in said will, would have done had he survived the testator, and not otherwise. And for that because her said father, if living, would not be entitled to any distributive share of said estate, nor to his devise or legacy under said will, because his estate is indebted to the estate of the said Addison in an amount largely in excess of what his distributive share, devise or legacy would be, to-wit, in an amount exceeding the sum of $7000. Wherefore the said executor prays the court that said motion be overruled and said petition denied, and the costs of this proceeding be taxed against the petitioner."

These pleadings show clearly an allegation of $5000 being due relator's ward as her distributive share under the partial distribution set out therein; and they show a denial of that claim only for the reason that her deceased father, as original legatee, died owing the testator more than his legacy, and for *that* reason *only* the court should refuse to order him to pay her as he had the others. The specific sum alleged to be due stood confessed, unless it was cancelled by the debt her father owed the testator which was set up as *the* reason he had not paid her as he had the others. So, on appeal to the circuit court, the facts were agreed upon in which the sole defense claimed was that the ward was not entitled to the $5000 claimed, on account of her father being indebted to the testator. And so the trial judge understood it, for it is recited in the judgment itself that the court, "after being fully advised in the premises, doth find that the estate of Daniel S. Payne, the father of the minor Ruth I. Payne, is insolvent and that the said estate is in-

Digitized by Google

debted to the estate of Addison Payne, Sr., in an amount in excess of the distributive share of the said Ruth I. Payne, in said estate, to-wit, in the sum of $6900. It is therefore ordered, adjudged and decreed by the court that the petition of the plaintiff praying that the executor distribute and pay over to him for the use and benefit of his ward the sum of $5000, be and the same is hereby denied and the said petition dismissed, and the costs," etc. Thence, the case was brought to this court on appeal wherein the entire face of the record is a concession that the sum of money ($5000) paid to the other residuary legatees should be paid to this relator for his ward unless her claim was nullified by the indebtedness of her father to the testator. This was answered in the opinion of this court reversing the judgment of the circuit court, directing that court "to find for the plaintiff the sum shown to be due." Not a sum to be shown to be due—not what the result of further litigation might thereafter show to be due—but what the record then present before us showed to be due, viz., $5000 and interest.

The extreme length to which the executor went in his effort to avoid the legitimate result of his defeat in the litigation between himself and relator, well illustrates the frailty of his reasoning and the absurdity of his claim. He testified that notwithstanding he had made four annual settlements in the probate court, each of which showed a large cash balance of many thousands of dollars in his hands belonging to the estate, after deducting the distributions mentioned and his commission of five per cent on $49,416.76 (the one at the time relator asked for his ward's share showed $19,136), yet that he had no cash save perhaps $150. That though he reported sales of real estate ostensibly for cash at prices ranging from $23,460.80 down to $950, that this was sold on time and notes taken for the principal part of the purchase money.

Digitized by Google

And that notwithstanding he reported in such settlements, sworn to by him, that he had paid out the distributive shares aforesaid, he had in reality conveyed real estate to the legatees, for such shares, taking their notes for the excess of the purchase price over the distributive shares.

He was thus allowed to traverse his sworn settlements—his pleading—his continued admission throughout the length of the litigation. He was allowed to show that white was black, that cash was credit, and that a prosperous estate with large cash balances, was a myth. These things should not have concerned the trial court. The executor had chosen his ground and laid out his course without that court's knowledge and it is in nowise responsible for his action except to see that he abides by it. The executor, if he had any reason, aside from the legal question, for refusal to pay over this child's share, should not have held it back and relied upon only one as the reason he had not paid her. He cannot be allowed to divide up his different defenses and demand that relator shall sue him as many times as his defenses may number. One case should end the controversy over all matters then existing. [Emmert v. Aldridge, 231 Mo. 124; Spratt v. Early, 199 Mo. 491, 500; Donnell v. Wright, 147 Mo. 639, 647.]

Though the original case was in the probate court, formal pleadings were filed and his plea does not deny (nor, as we have shown, was there ever any denial) generally or specially, the allegations of the petition setting up the ward's right to the distributive share paid the others. It is stated in such plea that she was not entitled to the sum of $5000 "for that because" she did not take from her grandfather testator by inheritance, but from her father by virtue of the statute; "and for that because" her father, if living, would not be entitled to a distributive share on account of his indebtedness to the testator, she being only entitled

Digitized by Google

to her father's interest. His plea was, practically, a confession and avoidance and his avoidance having failed, his confession stands. His plea was a tacit admission "that independently of the matter disclosed in the answer, the plaintiff would have a right of action." [1 Chitty on Pleading (16 Ed.), star pp. 551-558; Phillips on Code Pleading, secs. 240, 235, 69-71; Bliss on Code Pleading, sec. 340.]

These views show that the trial court has misunderstood the direction given to the circuit court in the words "to find for the plaintiff the sum shown to be due," else it doubtless would have immediately rendered judgment that the executor distribute and pay over to the relator for the use of his ward the sum of five thousand dollars and interest from the day (at least) of relator's petition to the probate court. This misunderstanding of the direction of this court probably arose from the fact that the personnel of the trial court changed, the newly elected judge who received the mandate not being the judge who tried the case. These views also relieve the case of the embarrassment suggested by the trial court in it being required to enter into a trial and investigation as to the sum due the ward. That, as has been herein explained, has been all along ascertained and admitted. And when it received the mandate of this court, it had no power or authority to go outside of or beyond the directions given, or to do otherwise than as therein required to do. [Stump v. Hornback, 109 Mo. 272, 277; Rees v. McDaniel, 131 Mo. 681; Fanning v. Doan, 146 Mo. 98.]

But it is suggested that the return shows another matter which should deprive relator of the right to demand that the circuit court comply with the directions of this court. Which matter is stated to be the right to appeal; and that when the circuit court refused to comply with such directions and transferred

Digitized by Google

the case to the probate court with directions for that court to comply with the mandate of this court, relator did not appeal. And that on the executor's appeal to the circuit court from the probate court's order, relator moved to dismiss the appeal and afterwards to strike it from the docket and for the court to proceed to obey the mandate of this court, and when these motions were denied relator did not appeal therefrom, but began the present proceeding.

It is true that mandamus will not be permitted to perform the office of an appeal, and does not lie when an appeal affords a remedy (State ex rel. v. Fort, 180 Mo. l. c. 108, 109; State ex rel. v. Lubke, 85 Mo. 338; State ex rel. v. Buhler, 90 Mo. 560; State ex rel. v. County Court, 109 Mo. 248); and will not be issued to compel a certain judgment to be rendered. [State ex rel. v. Smith, 105 Mo. 6.]

But these rules of law are founded on the assumption that the matter in controversy is a proper subject of trial and judgment thereon in the tribunal complained of. If it were necessary to appeal from the refusal of a judicial tribunal to perform its duties in relation to matters already fixed, determined and adjudicated, the use of the writ of mandamus would be greatly lessened and its benefits much curtailed. In instances like the present, the interested party would be denied the privilege of suggesting to the court that it carry out directions given by an appellate court, except upon condition that he forfeit his right to mandamus in case of refusal. Certainly the continuous and persistent insistence of the relator that respondent perform the directions of this court ought not to bar him of the only effective remedy left him. If peremptory directions of an appellate court to a trial court must become the subject of trial and readjudication in that court and another appeal taken, and then another, where would be the end?

Digitized by Google

It is also said that a peremptory writ should be denied for the reason that the alternative writ, which included the petition therefor, asks for more than relator has shown himself to be entitled to. [State ex rel. v. Railroad, 77 Mo. 143; State ex rel. v. Police Commissioners, 80 Mo. App. 206; State ex rel. v. Field, 37 Mo. App. 83.] But we do not find this to be the fact. The petition is full and does refer to "such further sums," in addition to the $5000, which may have been distributed by the executor to the other heirs. But this is immediately followed by allegations that no further distributions have been made. So that the alternative writ, in fact, only asks that respondent enter judgment for the $5000 determined to be due the relator as guardian and the interest thereon. Though we have authority to permit an amendment (School Dist. v. Landerbaugh, 80 Mo. 190) we think it unnecessary.

The motion for judgment will therefore be sustained, and since the sum shown to be due in the original case was five thousand dollars, and since interest should run on that sum, at least from the 10th of February, 1910, the time of filing relator's petition in the probate court asking that that sum be distributed and paid to him for his ward, we will direct that a peremptory writ be issued commanding respondent to enter judgment in favor of relator for that sum of money with interest at six per cent per annum from that date. The other judges concur.

Digitized by Google

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1913.

FREDA VAN LOON, Appellant, v. ST. JOSEPH RAILWAY, LIGHT, HEAT & POWER COMPANY, Respondent.

Kansas City Court of Appeals, October 6, 1913.

1. **NEW TRIAL: Practice, Trial: Power of Judge to Grant.** Where one new trial has been granted on the ground that the verdict is against the weight of the evidence, the court has no power to grant another new trial on that same ground. And the fact that misconduct of the jury in the first trial was given as an additional reason for setting that verdict aside will not change the rule.

2. **———: ———: ———: Attempt to Influence the Jury.** But where the second verdict is set aside by the trial judge because it was clearly proven to him that an atempt to improperly reach and influence the jury was made, and the circumstances are so suspicious, in the opinion of the trial judge, that such attempt was not only made but was accomplished, that he is led to set aside the verdict on that ground, the fact that he took into consideration that the verdict was against the weight of the evidence as a circumstance tending to confirm him in such view, will not take away from him the power

Digitized by Google

to set aside the second verdict and grant a new trial. In such event the verdict may be said, in legal effect, to indicate misbehavior on the part of the jury, and so bring the case within one of the exceptions contained in the statute forbidding the granting of more than one new trial.

3. ———: ———: ———: **Discretion of the Trial Judge.** Where a verdict is set aside by the trial judge because he is of the opinion improper influences have been exerted, sound public policy requires the appellate court to uphold his action if possible. The trial court is in a better position than anyone else to see and know what is going on, and his action in granting or refusing a new trial ought to be followed if the trial judge exercised his own judgment and did not clearly display a wholly unsound discretion.

Appeal from Buchanan Circuit Court.—*Hon. W. K. Amick*, Judge.

AFFIRMED. TRANSFERRED TO SUPREME COURT.

Ferrell & Mayer for appellant.

R. A. Brown for respondent.

TRIMBLE, J.—Appellant sued for damages alleged to have been caused by a fall received while attempting to alight from defendant's street car. The charge is that the fall was brought about by the careless jerking or sudden starting of the car while appellant was in the act of stepping off. The answer was a general denial and a plea that her injury, if any, resulted from her own negligence in stepping from the car before it came to a stop.

At the September term, 1908, the case was tried before Judge Ramey and a jury, and a verdict was returned against respondent for $5700. This verdict was set aside by the trial court "for the reasons that the verdict is against the weight of the evidence, and for misconduct of the jury in arriving at said verdict."

Thereafter the case was twice tried, once at the May term, 1909, and again at the January term, 1910, each time resulting in a hung jury.

Digitized by Google

At the May term, 1911, the case was tried for the fourth time, and a verdict was returned for appellant in the sum of $4000.

A motion for new trial was in due time filed, the grounds, of which, among others, were that the verdict was against the weight of the evidence; that it was so grossly against the overwhelming weight of the evidence as to shock the conscience and indicate that the jury was influenced by passion and prejudice and did not consider the evidence in the case or the instructions of the court; that the verdict was out of all proportion to the injuries proved and was so excessive as to shock the conscience and indicate that the jury disregarded both the evidence and instructions and returned a verdict based on passion and prejudice rather than on the law and the evidence; that improper and unlawful methods were employed to induce members of the jury to find a verdict for the plaintiff; that one J. Elliston made certain efforts to see and influence the jury in favor of plaintiff during the trial; that he had a list of the jurors and was endeavoring to reach them and improperly influence them in plaintiff's favor, but that he failed to reach the juror he was attempting to reach when discovered; that, during the trial of the case, a certain man named in said motion, and who was friendly to and apparently deeply interested in plaintiff's side of the case, was frequently in the court room observing the conduct and progress of the trial, consulting with persons interested in plaintiff's case, and frequently talked with one of the jurymen, and that said actions and conversations so aroused the suspicions of defendant's officers that one of them went to the man and told him his actions had been observed and commented upon, and that they were not consistent with disinterested motives, and requested him to let the jury alone and not attempt to interfere further in the case, but that said person did not comply with the request but continued to visit saloons and theaters

Digitized by Google

with said juror at night during the trial and before the rendition of the verdict; and that such facts were reported to the trial judge during the trial.

Various affidavits were filed in support and also in opposition to the motion for new trial. Two of respondent's affidavits, stating that neither respondent nor its attorneys learned of the attempt of said Elliston to reach or influence the jury until after the verdict was returned, were not filed within the time allowed by the court for filing affidavits. And objection is made by appellant to said two affidavits for that reason. These two were filed before the motion was passed on, and by permission of the court. It being within the discretion of the court whether he should allow them to be filed and considered, and he having done so, his action in that regard cannot be reviewed by us.

After having said motion for new trial under advisement for some time, the trial judge sustained the same, and had his reasons therefor entered of record as follows:

"All the points presented by the defendant in this motion for a new trial are overruled, except that the court says as follows:

That the verdict in this case is against the weight of the evidence, both as to the injuries and as to the facts creating a liability. However, a verdict in this case has been set aside once before on the ground that it was against the weight of the evidence, and the court would not disturb the verdict on that ground except for the fact that a party by the name of Jay Elliston, on behalf of the plaintiff, made an attempt to influence one of the jurors; that he did not reach the juror that he attempted to influence, but that he had with him a card to which he referred, upon which he apparently had the names of several persons, presumably jurors; that he was making an effort to influence this juror on behalf of the plaintiff, and the circum-

Digitized by Google

stances are so suspicious with reference to this party, Mr. Elliston, that in view of the fact that this verdict is against the weight of the evidence and in view of these suspicious circumstances with reference to the jury, the court sets this verdict aside. The juror attempted to be influenced was Juror Kendall, who did not sign the verdict." From the order granting defendant a new trial, plaintiff appealed.

Appellant's contention is that the court had no right to grant a second new trial on the ground that the verdict was against the weight of the evidence. The trouble with this contention is that it assumes that the circuit judge set the verdict aside on this ground. But did he set it aside because the verdict was against the weight of the evidence, or did he set it aside *because of the alleged attempts to influence the jury "and in view of these suspicious circumstances with reference to the jury?"* It cannot be denied that, in expressing his reason for granting a new trial, the judge was not as clear, precise and accurate as he might have been; and therein he has caused us much trouble. At first glance it would seem, in reading the reason given, that the judge is really setting aside the verdict on the ground that it is against the weight of the evidence and has seized on the conduct of Elliston as a means of getting around the statute forbidding another new trial. But we cannot impute such conduct or motive to him unless his language is so plain as to admit of no other construction. And a slight analysis shows that his language will not bear such an unhappy interpretation.

A reasonable interpretation of the trial court's language shows that he set the verdict aside because of the "suspicious circumstances" and the improper influences felt by the judge to be in the atmosphere. And he considered the fact that the verdict was against the weight of the evidence, both as to the facts creating liability and as to the injuries, *only as a strong*

Digitized by Google

circumstance going to show that all was not right, and consequently in the interest of justice, he felt that he ought to set the verdict aside. He did not set it aside because the verdict was against the weight of the evidence, but because he had, to his mind, positive proof that improper influences had been exerted, and he considered the verdict against the evidence as a circumstance convincing him that the improper influences had been successful. In such case what right have we for disturbing his action on appeal? If his suspicion of improper influences being exerted and reaching their mark have a basis in fact and not in mere wild fancy, and is so strong as to lead him in the exercise of judicial discretion to set the verdict aside on account thereof, can we interfere with such discretion in the absence of a showing that it was unsoundly exercised? If we do, then we establish a precedent that although a circuit judge has grounds for thinking things are not right in a trial before him and sets aside a verdict on account of improper influences surrounding the trial, yet the appellate court will undertake the task of reviewing his action although it is within his discretion and, so far as we are able to tell, he has soundly exercised it. This would be a dangerous precedent to establish. No one is in a better position than the trial judge to know what is in the air and what is going on from the facts laid before him.

We must remember that this is a case where the judge *sustained* the motion. That is, he was so impressed with the existence of the matters calling for a new trial that he granted it. It is not a case where the judge has considered the matters and, in the exercise of his own best judgment, has overruled the motion. If that were the case, we could readily say that the suspicious circumstances were not sufficient to overturn the verdict since the trial judge found they were not. In other words, if the trial judge exercised his judgment and discretion and found no reason for setting

Digitized by Google

the verdict aside, that ruling ought not to be disturbed by an appellate court whose judges do not see the witnesses, nor hear the trial, nor feel the atmosphere surrounding it, nor perceive the circumstances suspicious or otherwise attendant thereon. But, on the other hand, if the trial judge *does* think the verdict should be set aside, ought not the appellate court to defer also to his discretion, when he exercises it, in granting a new trial? We think we should, unless the facts on which he bases his action are so utterly insufficient as to show that the discretion he exercised was wholly unsound. In Allen v. Railroad, 167 Mo. App. 498, 151 S. W. 762, Judge NIXON of the Springfield Court of Appeals said:

"The rule has been announced in Missouri, with wearisome repetition, that trial judges have a wide discretion in granting new trials, in order to accomplish justice; that the duty of granting a new trial rests peculiarly and specially within the sound discretion of the trial judge; and that when a new trial has been granted the appellate court will reluctantly interfere, unless it is manifest and apparent that the judicial discretion of the trial judge has been abused, or that injustice has been done. [Parker v. Britton, 133 Mo. App. 274, 113 S. W. 259: Lee v. Knapp & Co., 137 Mo. 385; 38 S. W. 1107; Kuenzel v. Stevens, 155 Mo. 280, 56 S. W. 1076; Iron Mountain Bank v. Armstrong, 92 Mo. 265, 4 S. W. 720; Ensor v. Smith, 57 Mo. App. 584.] Where a new trial is granted by the court below, an appellate court will look at it with less scrutiny than if it had been refused. [Bloch Queensware Co. v. Smith-Saxton & Co., 107 Mo. App. 13, 80 S. W. 592; Udden v. O'Reilly, 180 Mo. 650, 79 S. W. 691.]" As the case now before us is one where the trial judge *sustained* the motion, the cases cited as holding certain conduct to be insufficient grounds on which to *reverse* the trial judge's action are hardly applicable.

Digitized by Google

But it is urged that section 2023, Revised Statutes of Missouri 1909, forbids the granting of more than one new trial, and there having been one new trial granted heretofore, this precludes the granting of a second new trial. That section reads as follows: "Only one new trial shall be allowed to either party except, first, where the triers of fact shall have erred in matters of law, second, when the jury shall have been guilty of misbehavior." This undoubtedly means that there is no limitation on the granting of a second new trial if either one of them is granted on grounds stated in the first or second exceptions contained in the statute. In Kreis v. Railroad, 131 Mo. 533, it was held that this section did not forbid the granting of one new trial to either party on the ground of the insufficiency of the evidence regardless of the number of new trials that may have been granted such party on other grounds. In fact, by the very terms of the statute, if the new trial is granted on grounds contained in either the first or second exceptions mentioned in the statute, then the limitation of the statute to one new trial does not apply.

Now it is held in a number of cases that a verdict may be so contrary to the evidence as to amount, in legal effect, to misbehavior on the part of the jury or may "be regarded as springing from improper motives and should not be permitted to stand in any event." [McGraw v. O'Neill, 123 Mo. App. 691, l. c. 705; Chlanda v. Transit Co., 213 Mo. 244, l. c. top of page 264; Partello v. Railroad, 217 Mo. 645, l. c. 661.] In Baker v. Stonebraker's Admrs., 36 Mo. 345, it is said that a verdict may be so greatly against the evidence "as to imply some gross partiality, or some prejudice or misconduct on the part of the jury." [See, also, Price v. Evans, 49 Mo. 396; Spohn v. Mo. Pacific Ry. Co., 87 Mo. 74, l. c. 84; Rigby v. St. Louis Transit Co., 153 Mo. App. 330, l. c. 335.]

Digitized by Google

So that, when the trial judge in this case says the verdict is against the evidence both as to the facts constituting liability and also as to the injuries sustained, and, as one new trial has been granted on that ground, he cannot set the verdict aside for that reason; but that, on account of the efforts to improperly influence the jury and in view of the "suspicious circumstances with reference to the jury" he sets the verdict aside, this in reality is saying that improper influences were exerted and that they are shown to be successful by the verdict rendered contrary to the evidence. In other words, this is, in fact, a declaration on the part of the trial court that not only was there misbehavior on the part of the persons attempting to influence the jury, but that there was also misbehavior on the part of the jury in listening to these suggestions and bringing in such a verdict. In such case, the statute is no barrier to the granting of a new trial. Because if, in granting a new trial the second time, the judge thought and had good reason to think that improper influences had been brought to bear on the jury, and, in addition to the "suspicious circumstances" discernible by him, he took into consideration a verdict which was not only contrary to the evidence as to how the injury occurred but which was also returned in disregard of the evidence as to the extent of the injuries sustained, then the statute would not forbid the granting of another new trial. In such case the returning of a verdict thus regarded by the circuit judge after a trial in which he saw "suspicious circumstances" would, in legal effect, constitute such misconduct as to bring the case within the second exception mentioned by the statute. And unless the statute plainly forbids the granting of the second new trial, the case should be affirmed. Because, where a verdict is set aside by the trial judge for reasons like the present case, sound public policy requires that his action be upheld if possible. The strongest deterrent against

Digitized by Google

improprieties of every sort is the knowledge that their inevitable result, if they are discovered, will be to undo all that is sought to be accomplished.

It will not do to say that because affidavits were filed showing that Elliston failed to reach the juror he was caught attempting to reach, and because affidavits were also filed explaining that the association with one of the other jurors was perfectly innocent and that nothing was said to him about the case, and because the court was unable to obtain affirmative proof to the contrary, therefore the court is compelled to overrule the motion for new trial. Defendant complained of this conduct and requested that it cease while the trial lasted. This request was reasonable and proper and should have been instantly and heartily complied with. The fact that it was not complied with served rather to increase the litigant's suspicion than to allay it. As said by a distinguished jurist, "The *appearance* of justice is almost as important as the substance of it in the conduct of trials." The sanctity and purity of proceedings in courts of justice should be above suspicion. The same standard should be maintained in them as Caesar demanded in the reputation of his wife. To say that a litigant has no ground of complaint if affidavits are filed denying anything improper, is as unreasonable as to say that a husband cannot complain of improper appearances in the association of another man with his wife provided they both assure him that nothing wrong has been done. And when the trial judge says that he is not satisfied that there was nothing wrong, but on the contrary believes there was, and that another trial should be granted on that account, shall we say to him that he is wrong?

A careful reading of the entire record in the case, done, not for the purpose of weighing the testimony or of coming to a conclusion as to whether there was corruption in the case, or whether there was improper

Digitized by Google

influences exerted upon the jury, but to see whether or not the trial judge abused his discretion, will convince a disinterested person that there is a sufficient showing to justify the trial court's action. The trial court has exercised his discretion and judgment and has granted a new trial. His action should be affirmed since it does not appear that he has clearly abused that discretion.

As a matter of justice it should be said that the record shows that, if anything improper did reach the jury, the attorneys in the case were in no way responsible therefor nor cognizant thereof, or of any attempt in that direction. We do not think that, even by implication, it should be inferred that they were in any way to blame for whatever did occur.

Neither is there an affirmative showing of any connection of plaintiff with such improper efforts. And the point is made that since the attorneys knew nothing of anything wrong, and no relation of Elliston with plaintiff was made to affirmatively appear, therefore, plaintiff ought not to be punished by having her judgment set aside on account of any improper efforts having been attempted by him. The first answer to this is that the judgment was not set aside as a punishment to anyone, but because the trial court thought that, under the circumstances, it ought not to stand. The only one to suffer punishment was Elliston whom the trial court sent to jail for contempt. The next answer is that, if the trial judge had good reason to think matters were not right and he set aside the verdict because of that belief, and the rule shall be established that nevertheless his action will not be upheld unless he can positively and affirmatively trace a corrupt intention direct to the party most deeply interested, then the trial court's power to keep the founts of justice pure and unpolluted will be greatly weakened and almost destroyed.

Digitized by Google

The order granting a new trial should be affirmed. *Ellison, P. J.*, concurs. *Johnson, J.*, dissents. Cause certified to Supreme Court.

DISSENTING OPINION.

JOHNSON, J.—I am unable to concur in the foregoing opinion and, deeming the conclusion therein reached to be in conflict with the decisions of the Supreme Court in McFarland v. Accident Association, 124 Mo. 204; Kreis v. Railway, 131 Mo. 533, and of the St. Louis Court of Appeals in Vermillion v. Parsons, 98 Mo. App. 72; Troll v. Protected Home Circle, 161 Mo. App. 719, I ask that the cause be certified to the Supreme Court.

SALLIE D. PIERCE, by her Guardian and Curator, JOSEPH DURFEE, Respondent, v. NEW YORK LIFE INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, October 6, 1913.

1. **LIFE INSURANCE: Terms of Application: Beneficiary.** The plaintiff, a minor, brought suit by next friend on two policies of ordinary life insurance issued to her mother by the defendant. The mother died and defendant refused to pay the policies on the ground that neither policy had been delivered to the assured and that the minor plaintiff was not the beneficiary of either policy. *Held*, that the plaintiff properly recovered for the value of the two policies.

2. **———: ———: ———: Waiver.** A party has the right in an application for insurance to stipulate when and under what conditions the contract shall go into effect, and where the application provides that the insurer shall not become liable as such until the payment of the initial premium and the delivery of the policy to the assured, such provision will be enforced and no recovery will be allowed against the company if the death of the applicant occurs while such conditions remain unperformed. But a stipulation of this character being

Digitized by Google

primarily for the benefit of the company may be waived by the company either by subsequent express agreement or by the conduct of the parties bespeaking a mutual intention to disregard it and to treat it as inoperative.

3. ———: ———: ———: **Death of Applicant.** There is no contract of insurance if the party insured reserved the right to accept or reject the policies when they were presented to him and he dies before he exercised that option.

4. ———: ———: **Change of Beneficiaries.** Where policies of insurance erroneously designate a beneficiary and the parties to the contracts agree to a change of beneficiary before the delivery of the policy and payment of the premiums, for the purpose of correcting the error, there is not a technical change of beneficiaries within the meaning of the terms of the policy but merely the designation of the beneficiary named in the applicant's proposal.

Appeal from Atchison Circuit Court.—*Hon. Wm. C. Ellison,* Judge.

AFFIRMED.

Culver & Phillip for appellant.

Hunt, Bailey & Hunt for respondent.

JOHNSON, J.—This is an action on two policies of ordinary life insurance alleged to have been issued and delivered by defendant to Alice R. Pierce for the benefit of plaintiff, her minor daughter.

The defenses of present concern are, first, that neither policy was delivered to the assured and, second, that plaintiff was not the beneficiary of either policy. A trial of the issues thus raised resulted in a verdict for plaintiff on both policies. Defendant appealed and argues that the court should have peremptorily instructed the jury to find in its favor.

On April 22, 1911, Alice R. Pierce, a widow living on a farm near Rock Port, made written application to defendant for an ordinary life policy for $2000. The application was procured by W. W. Gallaher, a solicit-

Digitized by Google

ing agent employed by and operating through defendant's branch office at St. Joseph, and contained the following agreements:

"1. That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and received by me during my lifetime, and that unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application.

"2. That any payment on account of the first premium before delivery of the policy to me shall be binding on the company only in accordance with the company's receipt therefor on the coupon receipt form duly filled out and detached from this application, which is the only authorized form of receipt for such payment.

"3. That the agent taking this application has no authority to make, modify or discharge contracts, or to waive any of the company's rights or requirements."

Gallaher's contract of employment also contained the following restrictions upon his authority as a soliciting agent: "It is agreed that said second party (Gallaher) shall have no authority for or on behalf of said first party to accept risks of any kind, to make, modify or discharge contracts, to extend the time for paying any premium, to bind the company by any statement, promise, or representation, to waive forfeitures or any of the company's rights or customary requirements, to name any extra premium for extra risks or privileges, to receive any moneys due or to become due to said first party except upon applications obtained through or by him, and then only in exchange for the coupon receipt attached to the application corresponding in date and number with the application, or upon policies or renewal receipts signed by

Digitized by Google

the president, a vice president, a secretary, or the treasurer, sent to him by the first party for collection."

The application was forwarded by Gallaher to defendant's home office in New York through the St. Joseph office, with the request that an additional policy of $3000 be issued, though Mrs. Pierce had applied for only one policy of $2000. Defendant, in response, issued and sent two endowment policies to the St. Joseph office, instead of policies on the ordinary life plan. These policies were returned without an effort being made to deliver them and thereupon defendant sent two policies for $2000 and $3000 respectively in which the estate of the assured was named as the beneficiary. Gallaher took these policies to Rock Port and left them with Doctor W. R. Strickland who was the president of a bank, defendant's examining physician at Rock Port and Mrs. Pierce's family physician. The instructions to the doctor were to collect the premium on one or both of the policies and to deliver them, or the one on which she paid the premium.

The policies contained a multitude of provisions and agreements, among them the following: "7. Change of Beneficiary--When the right of revocation has been reserved, or in case of the death of any beneficiary under either revocable or irrevocable designation, the insured, if there be no existing assignment of the policy made as herein provided, may, while the policy is in force, designate a new beneficiary, with or without reserving right of revocation, by filing written notice thereof at the home office of the company accompanied by the policy for suitable indorsement thereon. Such change shall take effect when endorsed on the policy by the company and not before. If any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured."

The policies were not delivered by Doctor Strickland and on June 13, 1911, Gallaher went to Rock

Digitized by Google

Port, obtained the policies and had an interview with Mrs. Pierce at Strickland's office in the bank. At first she declined to accept either policy. One of her objections was that she desired plaintiff, instead of her estate, to be her beneficiary, and another was that she did not have money enough in bank to pay the premiums on both policies. The first objection was removed on the agent's promise to return the policies to the company for cancellation and to have new ones issued payable to plaintiff. The agent stated, however, that he could not do this without the payment of the premiums on both policies. To meet the second objection, Dr. Strickland, who heard parts of the conversation, offered to pay a debt he owed Mrs. Pierce, which would give her sufficient funds to pay the premiums. Thereupon it was agreed, so Gallaher and the doctor testify, that Mrs. Pierce would pay the premiums at once, by check to Gallaher, that he would return the policies to defendant for cancellation, that new policies payable to plaintiff would be issued and delivered to Mrs. Pierce, and that she should have the option at that time of accepting either or both of the policies. In case she decided not to take either, Gallaher was to return her check and if she refused but one, the premium for that policy was to be refunded. We quote from Gallaher's testimony:

"She took the ground that she didn't have the money in the bank, and just how the matter came to be referred to Dr. Strickland I couldn't say, but at any rate he assured Mrs. Pierce that he would protect the check for the amount, but in that conversation Mrs. Pierce said again and again that the boys didn't want her to take the insurance and that she didn't know whether she would take it or not, and if she paid any money she wanted to be sure that she could accept one or the other, or neither of the policies, and that in case she accepted one the money advanced for the other should be returned, and if she accepted neither

Digitized by Google

all the money should be returned, and that is the point where I possibly called Dr. Strickland and said 'Mrs. Pierce, you don't know me, but Dr. Strickland does, and think he will vouch for my honesty in doing that.' I assured Mrs. Pierce that the money was simply paid to me in trust until she had accepted or declined the policies payable to Sallie D., her daughter, and I had her consent to secure such policies, and my intention at the time was—my understanding was that those policies made payable to the estate would be cancelled and entirely new policies would be made."

Apparently Mrs. Pierce entertained some idea that defendant would not recognize the oral promises of the agent as binding upon it and she asked Strickland if it would be safe for her to pay the premiums to Gallaher and allow him to retain the policies. Strickland answered that "Mr. Gallaher had been superintendent of schools here for a couple of years since I had lived in Rock Port and that I had known him off and on, ever since, that I regarded him as personally responsible and reliable, besides, he was under bond to the New York Life, so that she would either get her money back or the policies."

Thus reassured, Mrs. Pierce delivered to Gallaher her check for $324.57, the amount of both premiums, and Gallaher returned to St. Joseph with the money and the policies. The check was cashed and the proceeds paid over to defendant. The policies were not returned to the home office for cancellation but were kept by Gallaher almost two weeks. Defendant's manager at St. Joseph decided that instead of returning them for cancellation he would have Mrs. Pierce make application for a change of beneficiaries and after such change had been indorsed on the existing policies at the home office and they were returned, he would cause them to be delivered to Mrs. Pierce. Accordingly Gallaher went to Rock Port on June 26th and procured

Digitized by Google

from Mrs. Pierce the following written application for a change of beneficiary in the two policies:

"June 26, 1911. New York Life Insurance Co.,
346-348 Broadway, N. Y.

"The beneficiary under the accompanying policy, No. 427, 486-7, is hereby changed in accordance with the change of beneficiary clause thereof, to Sallie D. Pierce, daughter, such change to take effect only when indorsed on said policy at the home office. The policy is not now assigned."

Mrs. Pierce died July 3d, one week after signing the above application. On July 5th, the St. Joseph manager, not knowing of her death, forwarded the application and policies to the home office where they were received July 7th. On July 10th, the change was indorsed on both policies and they were returned to St. Joseph. In the meantime, the St. Joseph office received news of the death of Mrs. Pierce and the policies were sent back to the home office. Proofs of loss were made by plaintiff but the claim was rejected by defendant. As soon as defendant learned of the death of Mrs. Pierce it tendered $334.25 to the administrator of her estate and after this suit was brought, made a similar tender into court.

First we shall dispose of the questions discussed in connection with the first proposition of counsel for defendant that no contract of insurance had been entered into by defendant at the time of the death of Mrs. Pierce. The foundation of the argument is the stipulation in the written application "that the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and received by me during my lifetime." While it is true that a binding contract of insurance may arise from the acceptance by the insurer of a proposition from the applicant and without the issuance of a policy, the

Digitized by Google

policy not being the contract but only the written statement thereof, the courts of this State have uniformly recognized the right of the parties to an application for insurance to stipulate when and under what conditions the contract shall go into effect and where the application provides that the insurer shall not become liable as such until the payment of the initial premium and the delivery of the policy to the assured such provision will be enforced and no recovery will be allowed against the company if the death of the applicant occurs while such conditions remain unperformed. [Kilcullen v. Ins. Co., 108 Mo. App. 61; Bell v. Ins. Co., 166 Mo. App. 390; Rhodus v. Life Ins. Co., 156 Mo. App. 281; Gallop v. Royal Neighbors, 167 Mo. App. 85; Crohn v. Ins. Co., 156 S. W. 472; 170 Mo. App. 273.] But a stipulation of this character being primarily for the benefit of the company may be waived by the company (Rhodus v. Life Ins. Co., supra) either by subsequent express agreement or by the conduct of the parties bespeaking a mutual intention to disregard it and to treat it as inoperative.

Gallaher had no authority to sign, countersign, or issue policies. He was an agent employed by defendant to solicit insurance and collect premiums on policies issued and delivered pursuant to his efforts. He had no authority to enter into contracts with applicants different from that expressed in the printed applications and policies nor to waive performance of any of the terms and conditions therein stated and imposed. Mrs. Pierce was informed by the application of these restrictions on his authority and appears, from the testimony of defendant's witnesses, to have understood them. Gallaher assured her in the conversation just preceding the payment of the premiums that he would hold the money in trust until the new policies were issued and she had exercised her option to reject one or both of them and she seems to have acted in the belief that if he should break this agreement

Digitized by Google

and turn the money over to the company, she would have no recourse against the company, but would be compelled to take both policies. Consequently she made careful inquiries of Strickland (her physician in whom she had great confidence) about Gallaher, and parted with her money only on the assurance that he was a man in whom she could safely repose confidence.

These facts distinguish this case from those cited by defendant in support of the contention that "there was no contract of insurance if Mrs. Pierce reserved the right to accept or reject the policies when they were presented to her, and she died before she exercised that option." [Dickerson v. Ins. Co., 52 S. W. (Ky.) 825; Rogers v. Ins. Co., 41 Conn. 97; Hubbard v. Ins. Co., 105 N. W. (Ia.) 332; Watkins v. Bowers, 119 Mass. 383; Whiting v. Ins. Co., 129 Mass. 240.]

If Mrs. Pierce had paid the money to the agent under circumstances that would have led one in her place to believe that the acceptance of the money by the principal would be a ratification of the agent's promises, she, as well as the principal would be bound to give effect to such promises, but as we have said, the proof shows very clearly that in making the agreement giving her the option to refuse to take one or both of the policies she knew the agent was acting beyond the scope of his actual authority and dealt with him, after being reasured by Strickland, not as the representative of defendant, but as the party on whom she relied for the performance of the special promise. As was intimated by the judge at the trial, the circumstances under which she paid the premiums would have precluded her from maintaining an action against defendant for their recovery had she elected to reject the policies and Gallaher had refused to refund the money she had paid to him. A recovery in such case could have been successfully resisted on the ground that the application and policies afforded her no such

Digitized by Google

option, that the promise of the agent was unauthorized and that she had actual knowledge of his lack of authority.

So far as defendant was concerned the payment of the premium was unconditional and not subject to the option agreement. When this payment was made the agent had the policies in his possession and the only thing that prevented their actual delivery to Mrs. Pierce was her decision to have the beneficiary changed before their delivery. At this time no contract of insurance had been entered into and, therefore, no one had acquired any vested interest as a beneficiary. The plan of the agent to return the policies for cancellation and reissue was feasible and could have been carried out without the infringement of any vested interest and until the new policies had been issued and delivered to Mrs. Pierce, the contract of insurance would not have become existent. But this plan was abandoned by defendant for another which treated the existing policies as having been already delivered to Mrs. Pierce and accepted by her. Obviously the application for a change of beneficiary was made by her as being in pursuance of a provision of an existing contract and since defendant in requesting her to make such application elected to treat the contract as completed, it will not be heard (after the action on the request and the loss occurred), to take the opposite position and say that the contract still was inchoate at the time of her death. Clearly in treating the policies as delivered defendant waived strict compliance with the provisions for actual delivery as a condition precedent to the creation of a valid contract of insurance. The insurance went into force at the time Mrs. Pierce made written application to change the beneficiary.

Passing to the second proposition of defendant we think plaintiff is the beneficiary of the policies. The provision that a change of beneficiary shall not

Digitized by Google

become operative until indorsed at the home office on the policy is for the protection of the company and would be enforced were this an instance where beneficiary rights had vested prior to the application for a change. Here the parties had agreed on the change before the delivery of the policies, the payment of the premiums and, of course, before a contract of insurance had been created. The creditors and heirs at law of the applicant had acquired no interest and the change of beneficiary applied for by Mrs. Pierce was made merely for the purpose of correcting an error in the policies, to bring them into conformity with the proposal for insurance. That was not a technical change of beneficiaries within the meaning of the terms of the policies but—in effect, was merely the designation of a beneficiary by the applicant for insurance in her proposal.

The judgment is affirmed. All concur.

CORA SQUIER JONES, Respondent, v. THE BARBER ASPHALT PAVING COMPANY, Appellant.

Kansas City Court of Appeals, October 6, 1913.

1. **TAX BILLS: Preliminary Resolution: Implication of Law.** When the preliminary resolution for paving a public street, and the plans and specifications to which it refers, are silent on the subject of grading, the law will imply a duty on the part of the city to furnish a graded street to the contractor and a property owner would not be justified in thinking that the burden of such duty was included in the work proposed by the resolution.

2. ———: ———: **Specification of Time in Contract.** The failure of an ordinance to fix the time for the completion of the paving of a street does not invalidate the ordinance and the tax bills issued in payment of such work are not void because of long delay in letting the contract for the doing of

Digitized by Google

the work, if the contract was in compliance with the ordinance and the work was done and completed in compliance with the contract.

3. ———: ———: **Condition Precedent.** Where the charter and ordinances of Kansas City, in force at the time a resolution is passed to pave a street, does not make the filing of a preliminary estimate of the cost of the improvement a condition precedent to the enactment of the ordinance for the improvement, or the letting of the contract, then the tax bills issued for such improvement are not void because of the failure to file such preliminary estimate.

4. ———: ———: **Guaranty to Repair.** Where a contractor breaches his guaranty to keep the pavement in good repair, he becomes liable on his bond to respond in damages, but such a breach could not affect the validity of the tax bills issued in payment of the cost of the pavement.

Appeal from Jackson Circuit Court.—*Hon. Jas. H. Slover,* Judge.

REVERSED.

Scarritt, Scarritt, Jones & Miller for appellant.

Gage, Ladd & Small for respondent.

JOHNSON, J.—This is a suit in equity commenced in the circuit court of Jackson county on March 28, 1908, to cancel certain special tax bills issued by Kansas City, May 24, 1905, in payment of paving Troost avenue from the south line of Thirty-eighth street to the south line of Forty-seventh street. A trial of the issues raised by the pleadings resulted in a judgment for plaintiff in accordance with the prayer of the petition and the cause is here on the appeal of defendant.

Point is made by defendant that plaintiff is not the owner of the property against which the tax bills in question were issued and, therefore, cannot maintain this action, but in the view we take of the case it will not be necessary to discuss that question and we

Digitized by Google

shall treat plaintiff as the owner of the property which abuts on Troost avenue between Thirty-eighth and Fortieth streets as the proper party to prosecute this action.

The city council enacted an ordinance in 1900, establishing the grade on Troost avenue between Thirty-ninth and Forty-seventh streets. Before the thoroughfare came under the jurisdiction of the city it was a county road and had a macadam roadway. The ordinance made important changes in the grade and at various places between Thirty-ninth and Forty-seventh streets the old macadam was on a grade substantially different from that established by the ordinance. Shortly before the proceedings in controversy were initiated the street railway company extended the double tracks of its Troost avenue line south to Forty-seventh street and laid them to conform to the new grade.

On November 2, 1903, a petition for the paving was filed with the city engineer and on the same date the lower house of the common council passed a resolution "declaring the work of paving Troost avenue from Thirty-eighth street to Forty-seventh street to be necessary." The resolution provided: "The street to be paved the full width thereof, exclusive of sidewalks of legally established width and that part legally required to be paved by the street railway company operating thereon, with a genuine Trinidad Lake asphalt pavement to conform in all respects to detail "Q" of asphalt pavements, approved by the board of public works August 28, 1896, except there shall be macadam foundation of eight (8) inches in thickness, upon such foundation shall be laid a binder course one and one-half (1½) inches in thickness and upon said binder course shall be placed an asphalt wearing surface one and one-half (1½) inches in thickness, the matrix of which shall be composed of genuine Trinidad Lake asphalt. Said pavement to be constructed

Digitized by Google

of such material and in such manner that the same shall endure without the need of any repairs for a period of ten (10) years from the completion thereof. The total cost of said pavement not to exceed the sum of two dollars ($2) per square yard."

This resolution which was formally approved by the board of public works, passed the upper house November 9, 1903, went into effect on that date, and was duly published.

On November 2, 1903, an ordinance was passed in the lower house to grade Troost avenue, the full width thereof from Thirty-eighth street to Forty-seventh street "and to the established grade of the same." The ordinance passed the upper house November 9th and was approved by the mayor November 16, 1903. The contract to do the grading under this ordinance was let July 12, 1904, the grading was completed at a cost of $8000, and was paid for in special tax bills. The grading covered the full width of the street inclusive of sidewalk spaces and brought the entire street to the established grade.

On December 21, 1903, and pursuant to the resolution we have noted, an ordinance was enacted "to pave Troost avenue from the south line of Thirty-eighth street to the south line of Forty-seventh street." It provided that "the street shall be paved the full width thereof exclusive of all sidewalks," that "the work and improvements shall consist of a genuine Trinidad Lake asphalt pavement to conform in all respects to 'detail Q' of asphalt pavement approved by the board of public works, August 28, 1896," that "the total cost of said pavement shall not exceed the sum of two dollars per square yard," that "the work shall be paid for in special tax bills against and upon the lands that may be charged with the cost thereof according to law," and that "the contract . . . shall guarantee that the same shall be constructed with such materials and in such manner that the same shall en-

Digitized by Google

dure without the need of any repairs for the period of ten years from and after its completion." It was further provided that the contractor should give a bond securing the performance of the contract. No time for the beginning and completion of the work was stated. The passage of the ordinance was formally recommended by the board of public works. The contract for the paving under this ordinance first was advertised to be let April 4, 1904, but there was no bid. Again, it was advertised to be let July 21, 1904, and on that date the defendant made the only bid but no contract was entered into. Finally the letting was advertised for August 30, 1904, and the contract was let to defendant on its bid to do the work at two dollars per square yard. This was done after the completion of the grading of the street.

The contract, which was confirmed by the council September 12, 1904, contained detailed specifications of the work and also by express provision made the "plans and specifications on file in the office of the city engineer relating to the work herein contemplated . . . a part of this contract and specifications." Referring to "detail Q" the contract provided that "the pavement shall consist of macadam foundation already in place upon the street and sufficient new macadam so as to bring the surface when thoroughly compacted to within three inches of the established grade and cross section of the street." As to the time of doing the work it was stipulated that work "be commenced within ten days from the time the contract binds and takes effect . . . and completed . . . within ninety days after the date of confirmation;" that "in case the contractor shall fail to complete all the work herein contemplated, in accordance with the terms of these specifications, within ninety (90) days as aforesaid, the city engineer shall deduct from the aggregate amount due according to the considerations of this contract an amount equal to ten (10) dollars

Digitized by Google

per day for each and every working day after said ninety (90) days that the work is not completed as aforesaid." That "no allowance will be made for additional time for the completion of this contract unless the contractor shall be delayed or restrained from prosecuting the work, or any and every part thereof, or unless the time is extended by the passage of an ordinance by the common council for the number of days stated in such ordinance," and that "the days work on this contract lost in consequence of injunctions or court proceedings, bad weather, grading, curbing, trenching, by other contractors, corporations or individuals, over whom the party of the first part has no control, organized general strikes, or burning of any plant where the materials for this contract are manufactured or made, shall be added to the number of days specified in this contract within which work shall be completed."

The work was not completed in the time specified in the contract but before the expiration thereof (Dec. 12, 1904) the city, on the petition of defendant, extended the time by ordinance to June 1, 1905, the cause stated in the ordinance being "sewer along street from Thirty-eighth street to Forty-seventh street." It does not appear that the passage of this ordinance was recommended by the board of public works. The work was completed within the time provided in the extension ordinance and according to the plans and specifications.

"Detail Q" to which reference was made in the resolution and ordinance for the paving was one of the details of a general plan for paving upon an old macadam base which was approved by the board of public works on August 28, 1896, and since that date had been on file in the office of the city engineer. It was a blue print on which was drawn general and detailed plans for the laying of a new pavement of either asphalt or brick on old macadam. A general cross

Digitized by Google

section of such repavement was shown followed by five detailed plans lettered respectively "N. Q. P. R. and O." The first three referred to asphalt pavements, the last two to vitrified brick. Specifications were written on the blue print and those relating to "detail N" provided: "The pavement shall consist of the macadam foundation already in place upon the street and sufficient new macadam so as to bring the surface when thoroughly compacted to within 3½ inches of the established grade and cross section of the street.

"Subgrade—The space over which the pavement is to be laid will be excavated to a depth of at least 3½ inches below the established grade and cross section of the street. Should there be any soft or disintegrated material in the bed thus prepared all such material will be removed and the spaces thus excavated, as well as all holes and irregularities found or excavated below the proper surface of the subgrade, shall be filled with broken limestone. . . . Any irregularities which may occur in the surface must be corrected as the work progresses and all depressions filled as above specified, rewatered and rolled until the surface is finished and consolidated to the proper grade and crown. Upon the foundation thus prepared shall be placed a binder course of 1½ inches in thickness and upon this binder course a wearing surface of two inches in thickness composed of Trinidad Lake asphalt."

The specifications relating to "detail Q" were as follows: "Subgrade is to be prepared as specified in "detail N" except that the excavation and new macadam of the foundation shall be brought to within three inches of the established cross section and grade of the street. Upon the subgrade thus prepared shall be placed a binder course of 1½ inches in thickness and upon this binder course a wearing surface of 1½ inches in thickness composed of Trinidad Lake asphalt."

Digitized by Google

The cross sections of "details N" and "Q" showed first a bed of old macadam, second, a layer of new macadam to bring the bed to the required height, third, the binder course and fourth, the wearing surface of asphalt. The only substantial difference between the two details was in the thickness of the surface course. Aside from what we have noted relating to subgrading, the plans and specifications contained in the blue print were silent on the subject of grading and appear to have been prepared to apply only to streets that had been paved with macadam laid to the established grade and which, therefore, required no grading for the new pavement except such subgrading as might be necessary to prepare a proper foundation for the binder and surface courses.

Counsel for plaintiff argue, in substance, that the resolution, in legal effect, at least, required that the proposed work of paving the street to its full width exclusive of sidewalks according to the specifications of "detail Q" included the grading necessary to bring the street to the established grade and that since such grading was done under a separate proceeding and at additional cost to the property owners, the tax bills in question must be held void under the rule that the work specified in the resolution must be the work contracted to be done or the tax bills will be void. [Trenton v. Collier, 68 Mo. App. 483; City of Boonville v. Stephens, 95 S. W. 314.] The charter of Kansas City in force at the time of the passage of the resolution in question (sec. 2, art. IX, Charter & Revised Ordinances, 1898) provided "that whenever the common council shall deem it necessary to pave . . . any street . . . and payment for such work and improvement is to be made in special tax bills, the common council shall, by resolution, declare such work or improvement to be necessary, stating the kind of paving material proposed to be used, and such resolution or the substance thereof, shall be published for ten

Digitized by Google

days . . . and unless the resident owners of the city who own a majority in front feet of all the lands belonging to such residents and fronting on the street . . . to be improved shall, within thirty days from the first day of such publication file with the city clerk a remonstrance, signed by them, against the proposed improvement, then the common council shall have power to cause the proposed improvement to be made and to issue special tax bills therefor."

The passage and publication of such preliminary resolution is jurisdictional. [City v. Bacon, 144 Mo. App. 477; Coulter v. Construction Co., 131 Mo. App. 230; Paving Co. v. O'Brien, 128 Mo. App. 267; Kirksville v. Coleman, 103 Mo. App. 215.]

The resolution is for the prime benefit of the owners whose property is to be taxed to pay for the improvement and its publication calls on such property owner to decide whether the work shall go on with his consent or whether he shall file a remonstrance. The resolution affords him an opportunity to be heard on the subject of the necessity and wisdom of the proposed improvement and, therefore, it is indispensable that he should have accurate information. Should the subsequent ordinance and contract for the improvement deviate materially from the resolution the whole proceeding will be void for the reason that the property owners have been deprived of the right the law intends they should have to be informed at the start of the true nature of the improvement for which they are to pay. Should we find that the resolution under consideration told the property owners, in effect, that the work of paving the street included all necessary grading and that the entire work would be done at a maximum cost of two dollars per square yard, we would hold it would not support the subsequent proceedings ending in a contract which relieved the contractor of the burden of grading.

Digitized by Google

On the other hand if we should find that the resolution dealt only with the subject of paving a street already graded to the established grade and was not intended to include grading necessary to bring the street to such grade, we must hold the resolution sufficient. If the resolution for paving and the plans and specifications to which it refers are silent on the subject of grading the law will imply a duty on the part of the city to furnish a graded street to the contractor. [Hilgert v. Barber, 107 Mo. App. l. c. 388; Ash v. Independence, 79 Mo. App. 74.] And a property owner would not be justified in thinking that the burden of such duty was included in the work proposed by the resolution.

Turning to the resolution in hand we find it does not speak of grading but is confined to the subject of paving. Certainly a property owner reading it could not reasonably infer that the work of bringing the street to the established grade was intended to be a part of the improvement proposed by the resolution and if he had gone to the office of the city engineer and examined the plans and specifications to which he was referred, he would have discovered that they called for no grading except such subgrading as might be required to prepare a street already brought to the established grade for a new pavement to replace an old one. Further he would have discovered upon inquiry that a separate grading ordinance had been passed and would have known that the bidders for the paving would be asked to bid on the basis of a graded street. We do not sanction the argument that there was a vital variance between the resolution, ordinance and contract. They all relate to the same subject-matter, i. e., the paving of a street already brought to the established grade. The property owners could not have been misled and having been given a fair opportunity to object to the proposed improvement which afterwards was made, pursuant to the terms of the resolu-

Digitized by Google

tion, the legal object and purpose of the provision of the charter requiring the passage of a preliminary resolution was fully accomplished.

The ordinance for the improvement, as stated, was enacted December 21, 1903, and, after the passage of the grading ordinance, instead of having the effect of repealing the latter ordinance, was consistent with it and clearly advised property owners and contractors that the only work to be let was the paving of the street and that no other grading would be required of the contractor than the subgrading specified in "detail Q." Inasmuch as the old macadam did not cover the full width of the proposed pavement, the work to be done by the paving contractor as outlined in the ordinance and specifications necessarily included the work of subgrading the unmacadamized part of the proposed roadway to a depth admitting of the laying of new macadam to piece out the old macadam bed but it was not intended that the paving contractor should do any other grading at the sides of the old pavement. The grading required to bring those parts of the street to the established grade was to be done by the city in discharge of its implied duty to furnish a graded street to the paving contractor and had already been provided for in the grading ordinance. The ordinances for grading and paving being consistent with each other were valid expressions of the legislative authority of the city and since the property owners were fully advised in the manner provided by law of the true nature and scope of the proposed improvements, we perceive no ground upon which a just attack on the validity of the resolution and ordinance for the paving may be based.

It is argued that the contract for paving was not advertised and let within a proper time after the enactment of the ordinance. The first advertisement for bids was made about three months after the passage of the ordinance, but the grading had not been done and

Digitized by Google

no bid was filed. The contract was not let until August 30, 1904, eight months after the date of the ordinance and the question for determination is whether or not the ordinance had become spent and bereft of vital force at the time of the letting. Our decision in the case of City of Marshall to use v. Wisdom, 127 Mo. App. 460, is pointed to as an authority for the proposition that the ordinance had become invalidated by delay in proceeding under it. In that case the ordinance prescribed that "the work shall be completed within ninety days from the time the contract binds and takes effect." Bids were advertised for and the contract was let but for no disclosed or apparent reason eleven months were allowed to elapse before the contract was entered into. We held the jurisdiction of the city over the parties and subject-matter was a jurisdiction to proceed in the usual course of such matters and within the limits defined by law and that since time was made of the essence of the proceedings the law contemplated that there should be no unreasonable delay in entering into the contract after the letting thereof, since to permit such delay would tend to open the door to favoritism and fraud. But we are not confronted here with a question of unnecessary delay which serves to give the successful bidder unauthorized and unadvertised time to do the work and consequently gives him an unfair, secret advantage over other bidders, but with the question of whether or not a delay of eight months in letting the contract after the enactment of an ordinance which does not specify the time in which the work shall be done and, therefore, does not make time of the essence of the proceedings, *ipso facto,* and without regard for the peculiar circumstances of the case, robs the ordinance of all vitality.

The Supreme Court in Jaicks v. Middlesex Investment Co., 201 Mo. 111, holds that the failure of an ordinance to fix the time for the completion of the work

Digitized by Google

does not invalidate the ordinance and that "tax bills issued in payment of the work are not void because of long delay in letting the contract for the doing of the work, if the contract was in compliance with the ordinance and the work was done and completed in compliance with the contract."

Where it appears that after the passage of the ordinance the proposed improvement was abandoned the rule requiring the city to proceed in the usual course of such matters and without unreasonable delay would prevent the revivication of an abandoned proceeding, but so long as the delay in letting the contract is due to excusing causes and not to a purpose to abandon the improvement, no good reason can be given for holding the ordinance impaired by such delays which could not discriminate among bidders or give opportunity for fraud or favoritism. The evidence discloses not only that the street was not brought to the established grade until about the time of the final advertisement for bids but that a sewer was being constructed in it. These were sufficient reasons for postponing the letting of the contract and, doubtless, was the reason for the refusal of defendant to bid in response to the first advertisement. There was no unusual or unnecessary delay in letting the contract and the proceedings to that point were valid and operative.

Another point made by plaintiff against the tax bills that the proceedings were invalid because of the failure of the city engineer to file a preliminary estimate of the cost of the improvement is well met by the answer that the charter and ordinances of Kansas City in force at the time did not make the filing of such estimate a condition precedent to the enactment of the ordinance for the improvement or the letting of the contract. [Youmans v. Everett, 173 Mo. App. 671.]

There is no merit in the contention of plaintiff that the work was not completed in proper time. As

Digitized by Google

we have shown, the ordinance did not make time of the essence of the proceedings and, therefore, the duty imposed by law upon the contractor with respect to the time in which he should do the work was that he should complete the improvement within a reasonable time. The contract specified ninety days from September 12, 1904, the date of its confirmation as the time to be consumed in the work and prima facie that was a reasonable time, because the parties themselves agreed that it was. [Hund v. Rackliffe, 192 Mo. l. c. 325.] But as is said in the case just cited, "where, for any good reason shown, as the inability of the contractor to procure a portion of the materials necessary for the doing of the work, as appears in this case, the work cannot be completed within the contract time, it would be a narrow, strained, unnatural and unreasonable construction of the law to hold that the municipal assembly had not the power, during the life of the contract, to extend the time for the completion of the work; for such act of the municipal authorities would be a legitimate determination of what constitutes a reasonable time, and as no appreciable damages could thereby ensue to the property owner by the extension, the courts will not interfere with the legislative determination of the reasonableness of the time for the completion of the work."

The council within the life of the contract extended the time by ordinance to June 1, 1905. This declaration of the legislative body of the city that good cause existed for the extension must be given weight and should not be declared untrue except upon clear and convincing proof to the contrary. Turning to the record we find abundant justification for the action of the council in evidence of unfavorable weather and the prosecution of other work on the street. Under the charter and ordinances the council had authority to enact the extending ordinance in the absence of a recommendation from the board of public works.

Digitized by Google

Finally it is argued that the pavement constructed by defendant was wholly worthless. Many witnesses who resided on the street testified that in two years after its completion the pavement became badly out of repair but the great weight of the evidence sustains the action of the officers of the city in accepting the work as done in compliance with the terms of the contract.

The position of plaintiff is well answered in the following quotation from the opinion in Construction Company v. Coal Co., 205 Mo. l. c. 74:

"It is next insisted that the acceptance of the work by the city engineer was void, for different reasons. First, that the pavement was not of such quality that it would endure for five years from and after the completion of the work without the need of any repairs. Section 5 of the ordinance under which this work was done provides that "the work herein authorized shall be executed with a guarantee that the said pavement shall be constructed with such materials and in such a manner that the same shall endure without the need of any repairs for a period of five years after the completion and acceptance of the same without further compensation than that provided for in the contract for the first cost of such work, and for which the said special tax bills are issued." And the contract contains a similar provision. The evidence quite clearly showed that there were holes in the paving, both before and after it was finished; it also showed that the contractor relaid and repaired two or three of the blocks after the payment was put down. A guaranty of this character has been upheld by this court in Asphalt Paving Company v. Ullman, 137 Mo. 543; Seaboard National Bank v. Woesten, 176 Mo. l. c. 59, and cases there cited. The guaranty being good it does not mean that the pavement shall endure without any need of repairs for five years, but that it shall endure for that period without further compen-

Digitized by Google

sation than that provided for in the contract for the first cost of such work; in a word, it bound the contractor to repair the pavement from time to time and keep it in repair for five years without further compensation therefor. While the evidence shows there were holes in it, it also showed that it had been repaired, and had given good satisfaction as a street.

If defendant breached its guaranty to keep the pavement in good repair it became liable on its bond to respond in damages but such breach could not affect the validity of the tax bills issued in payment of the cost of the pavement.

We have answered the principal attacks on the tax bills. In our opinion they are valid and the court erred in holding otherwise. The judgment is reversed. All concur.

JAMES E. HICKEY, Respondent, v. THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, October 6, 1913.

1. **CARRIERS OF LIVE STOCK: Damages: Delayed Shipment: Federal Law.** The plaintiff sued to recover damages for a delayed shipment of cattle over the defendant's railroad. The cattle were received at Stewartsville to be shipped to Chicago. The defendants unloaded the cattle at Galesburg in order to feed and water them, as they were compelled to do under the Federal "twenty-eight hour" law, unless the shipper otherwise specified in writing, which he did not do. *Held*, that the delay was caused by the action of plaintiff in electing to have the cattle unloaded at Galesburg, and not by any negligence of the defendant.

2. ———: ———: **United States Statutes.** The U. S. Comp. Stat., pp. 1178-79, provides that no railroad shall confine live stock in cars for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner into

Digitized by Google

properly equipped pens for rest, water and feeding for a period of at least five consecutive hours, provided that upon the written request of the owner, which written request shall be separate and apart from a printed bill of lading or other railroad form, the time of confinement may be extended to thirty-six hours.

3. ———: ———: ———: ———: **Burden of Proof.** In order to recover the damages sustained in consequence of delay in the transportation of a shipment the burden is on the plaintiff to show not only an unusual delay but that such delay was caused by negligence of defendant. Negligence is the gravamen of the action and the rule is well settled that mere proof of delay, of itself, will not support an inference of negligence.

Appeal from Clinton Circuit Court.—*Hon. A. D. Burnes,* Judge.

REVERSED.

M. G. Roberts and *Jno. C. Carr* for appellant.

Frost & Frost for respondent.

JOHNSON, J.—This is an action against a common carrier to recover damages resulting from negligent delay in the transportation of four carloads of fat cattle to market. The cattle were received by defendant at Stewartsville on July 3, 1910, for carriage to Chicago and the petition alleges that defendant failed to transport them in accordance with the requirements of the shipping contract or within a reasonable time, "but on the contrary said four carloads of cattle were negligently and carelessly delayed en route between the points aforesaid and allowed to stand on the track in the cars for a long space of time and in excess of the time required to transport said cattle by the use of ordinary care and diligence. That by the use of ordinary care and diligence said defendant should have transported said cattle to their destination by early on the morning of July 5, 1910, in

Digitized by Google

good time for the market on that day but by reason of defendant's negligence as aforesaid said cattle failed to reach said stockyards in the city of Chicago until five o'clock p. m., on said fifth day of July long after the market for said day had closed."

The answer admits the receipt of cattle for shipment from Stewartsville to the stockyards at Chicago, denies the other allegations of the petition and alleges in substance, that the delay of which plaintiff complains was caused by the necessary compliance by defendant "with the Federal law governing transportation of live stock by common carriers, commonly known as the 'Twenty-eight Hour Law.'" A trial of the issues resulted in a verdict and judgment for plaintiff for $250 and the cause is here on the appeal of defendant whose principal contention is that the demurrer to plaintiff's evidence should have been given.

The cattle were shipped on train No. 74, which left Stewartsville at nine o'clock p. m. on schedule time. The time tables introduced in evidence by defendant scheduled that train (which was defendant's best and fastest train for the carriage of live stock from Stewartsville to Chicago) to leave Brookfield at 2:45 the following morning, Quincy, Ill. at 10:30, to arrive at Galesburg, Ill. at 4:00 p. m., to leave that point at 8:30 p. m. and to arrive in Chicago the next morning (July 5th) at six o'clock—a total of thirty-three hours. At Galesburg the train was divided into two or three and sometimes four sections, the last section leaving for Chicago at 8:30 p. m.

The evidence of plaintiff relating to the usual time consumed in the transportation of cattle from Stewartsville to Chicago on that train does not differ materially from that of defendant. All of the evidence shows that the time was in excess of twenty-eight hours. The train in question arrived at Brookfield on time but was four hours late in leaving that place, due, so plaintiff contends, to negligence in waiting for an-

Digitized by Google

other stock train from Kansas City. Some of this lost time was regained and the train arrived at Galesburg at 6:45 p. m.—two hours and forty-five minutes late. It required nine or ten hours for a stock train to run from Galesburg to Chicago and as twenty-two hours had been consumed in the transportation, defendant switched the cars to the stockyards at Galesburg and unloaded the cattle for food, water and rest, in obedience to the command of the Twenty-eight Hour Law. That law (U. S. Comp. Stat., pp. 1178-79, Supp. of 1909, Act of June 29, 1906, chap. 3594, sec. 3413), provides that no railroad company shall confine live stock "in cars for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours . . . provided that upon the written request of the owner . . . which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours." Plaintiff had filed no such request with defendant and in complying with the statute defendant, counting the time required for loading and unloading, could not have forwarded the cattle before one o'clock the following morning. There was a freight train leaving Galesburg for Chicago at that hour, but it was not a stock train and its schedule time of arrival at Chicago was in the afternoon, too late for the cattle to be put on the market that day. Defendant did not send the cattle on that train, but waited for the next stock train which left Galesburg at 8:45 a. m., July 5, and arrived at Chicago at 5:10 p. m. Forty-four hours were consumed in the whole journey, the usual time of which was eleven or twelve hours less.

In order to recover the damages he sustained in consequence of delay in the transportation of the shipment, the burden is on plaintiff to show not only an

Digitized by Google

unusual delay but that such delay was caused by negligence of defendant. Negligence is the gravamen of the action and the rule is well settled that mere proof of delay, of itself, will not support an inference of negligence. [Ecton v. Railway, 125 Mo. App. 223; Milling Co. v. Transit Co., 122 Mo. l. c. 275; McCrary v. Railway, 109 Mo. App. 567; Wright v. Railroad, 118 Mo. App. 292; Werbick v. Railroad, 131 Mo. App. l. c. 52; Clark v. Railroad, 138 Mo. App. 424.]

A delay caused solely by defendant's compliance with the provisions of the Twenty-eight Hour Law could not be actionable since it should be regarded as the result of the performance of a duty imposed by law. [Ecton v. Railway, supra.] The decisive question in the case for our solution is whether the evidence of plaintiff tends to show the unusual delay of twelve hours in the transportation was caused solely by the necessity of obeying the Twenty-eight Hour Law or was due to negligence.

We may concede for argument, without so deciding, that defendant was guilty of negligence in holding the train at Brookfield four hours but such concession does not carry with it the conclusion that such negligence produced any injurious effect. The train arrived at Galesburg in ample time for the cattle to be forwarded on the same train which did not leave Galesburg until 8:30 that evening and arrived at Chicago on schedule time and, of course, in time for the market of July 5th. Had plaintiff filed a written request for the cattle to go through without stopping for rest they would have made the journey on schedule time and within thirty-six hours. They would have gone forward on the same train that would have been employed in their transportation had they arrived in Galesburg on time. The unusual delay in arriving at Chicago, therefore, could not have been caused by the stop in Brookfield, and the failure of defendant to forward the cattle from Galesburg on train No. 74

Digitized by Google

was due entirely to the imperative requirements of the Twenty-eight Hour Law which would have prevented the cattle from going forward on that train had they arrived in Galesburg on time. In either event they could not have been forwarded before ten o'clock, long after the departure of the last section of train No. 74. Plaintiff could have prevented this delay at Galesburg by filing a written request for the cattle to go through without stopping for food, water and rest, and omission to take such action was the equivalent of a direct request that such stop should be made. He cannot justly complain of defendant for pursuing the only course his own conduct left open to it.

Nor may it be said with reason that defendant detained the cattle in Galesburg longer than was necessary to perform the duty imposed by the statute. They were forwarded on the first train that carried live stock and in failing to file a written request for a through shipment, plaintiff must be held to have contemplated that the regular service would be employed and that the cattle would not reach Chicago in time for the market of July 5th. Certainly it would be unreasonable to hold that defendant was bound to forward the shipment by special train. Clearly the delay was caused by the action of plaintiff in electing to have the cattle unloaded in Galesburg for food, water and rest, and not to any negligence of defendant. The learned trial judge erred in overruling the demurrer to the evidence.

The judgment is reversed. All concur.

Digitized by Google

BADGER LUMBER COMPANY, Appellant, v. W. F. LYONS ICE & POWER COMPANY et al., Respondents.

Kansas City Court of Appeals, October 6, 1913.

1. **MECHANIC'S LIENS: Entire or Separate Contracts.** Plaintiff contracted with an owner to furnish materials for a building and to deliver them when ordered and as needed. There was no lump sum agreed upon nor time stated when the account should cease, nor was the sale made with reference to any architect's plans of the building. The goods were furnished on a running account with reasonable regularity for nearly a year and up until May. From this time until the following October no materials were ordered or used. The building was not completed in May but the owner ceased operations for lack of money to run his business. Having succeeded in leasing the building in October the owner ordered further materials which were furnished and charged to the account and used in finishing the building. There was no refusal to extend credit further on the part of plaintiff and no closing of the account between the parties. *Held*, that the last items charged in October were not sold under a different contract but the whole account was under one entire general contract, so as to give plaintiff six months from the date of the last items in which to file his lien. The fact that the owner volunteered to pay cash for certain other items not included in the account and did pay cash for them will not change the contract as to subsequent items sold on credit as before unless the vendor refused to sell longer on the old contract.

2. ———: ———. Where the evidence is conflicting, or where the circumstances are such as that different inferences may be drawn from the same facts, the question whether goods are sold under one or under different contracts is for the jury. But where there is no dispute as to the facts, the question is one of law for the court.

3. ———: ———: **Running Account.** A running account is a mutual account between buyer and seller in which is charged from time to time, as ordered, the materials sold, and on which is entered the various credits to which the seller is entitled.

4. ———: ———. If the work to be done is distinct and separate in its nature, and is performed at different times, or if two different contracts are in fact made for different

Digitized by Google

parts of the work, these are marks to show that there was not one entire general contract covering the whole account. But if material is furnished all going to the same general purpose, though such work be done or ordered at different times, yet if the several parts form an entire whole, or are so connected together as to show that the parties had it in contemplation that the whole should form but one and not distinct matters of settlements the whole account must be treated as a unit.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell,* Judge.

REVERSED AND REMANDED (*with directions*).

Botsford, Deatherage & Creason for appellant.

Lathrop, Morrow, Fox & Moore for respondent, W. F. Lyons Ice & Power Co.

Bowersock, Hall & Hook for respondent, Fidelity Trust Co., Trustee.

TRIMBLE, J.—Suit to enforce a mechanic's lien for lumber and materials sold by appellant to the W. F. Lyons Ice & Power Company for the purpose of, and used in, constructing an ice manufacturing and meat packing plant. A jury was waived and the case was tried by the court. Appellant obtained judgment for $2918.45 on the account sued on, but was denied a lien.

It is clear, from the finding of facts preserved in the record, that the only reason a lien was refused was because the court thought the last two items in the account were sold under a different contract from that under which the rest were sold. If the two last items were sold under a separate contract, they could not be considered as a part of the original account, and if they were not a part of it, then the lien was not filed within six months after the account accrued. All other requirements of the statute for the establishment of a lien were complied with.

Digitized by Google

The first item in the account is dated September 3, 1908, and from this time the account continues down to and including May 3, 1909. From this date until October 9, 1909, there are no items charged and no materials were sold. But, on this date, an item of 4000 square feet of insulating paper was sold, and on October 12, 1909, an item of sixteen pieces of two inch by six inch No. 1 yellow pine lumber twenty-two feet long, was sold to the company and used by it in the building. The lien claim was filed January 29, 1910. If the two items above mentioned were sold under a separate and distinct contract from that under which the rest of the account was sold, then, of course, the account did not accrue on October 12, 1909, but accrued on May 3, 1909, which was more than six months prior to the filing of the lien claim. If, however, the last items were sold under the same general contract as the others were, then the lien was filed in time and should be enforced. So that the only question in the case is whether or not the materials bought and used in October, 1909, were furnished under such circumstances as to show they were sold, with the others, under one entire general contract, so as to give appellant six months from October 12, 1909, instead of from May 3, 1909, in which to file a lien claim.

Where the evidence is conflicting, or where the circumstances are such as that different inferences may be reasonably drawn from the same facts, such a question is one for the jury. [Darlington Lumber Company v. Smith Building Company, 134 Mo. App. 316; Cole v. Barron, 8 Mo. App. 509.] This rule is well established and is not disputed. The contention of appellant is that the evidence shows that all of the items, including the last two, were sold under one entire general contract, and that there is no evidence upon which can be based the trial court's finding that the last items were furnished under a different one. If this contention is true, it is within our power to

Digitized by Google

review the trial court's finding. If it is not true, that is, if there is any evidence supporting such finding, then it is a matter beyond our ken since we cannot weigh the evidence. To ascertain the truth of the matter requires a very careful examination of the entire record and of all the inferences to be drawn therefrom. As a result of such examination, it can be said that there is practically no dispute as to the facts which govern this final and ultimate question of whether the items in the account were furnished under one general contract or under two. So that, after all, in this particular case, the question whether the materials were furnished under one or two contracts resolves itself into what inference the law will draw from what the parties to the contract did. As said in Page v. Bettes, 17 Mo. App. 375: "The jury are to find what the contract in fact was; and whether the contract thus found is entire and continuing, is a question of law for the court." If, therefore, the undisputed evidence shows what the contract was, and that the materials were furnished thereunder according to that contract, then the question whether the contract is entire is a question of law. [Phillips on Mechanic's Liens, sec. 325.] And if the trial court has erred in its view as to what constitutes an entire contract, then it is our duty to correct that error.

It should be borne in mind that, so far as the contract is concerned, the only requirements demanded by the statute are that the materials for which a lien is sought must be furnished "under and by virtue of a contract with the owner" (Sec. 8212, R. S. Mo. 1909). Of course, this means that all the items in one lien account must have been furnished under the same contract. But if the evidence shows that all the items were furnished "under and by virtue of" one contract, then the vendor is entitled to his lien although there may be facts and circumstances showing that they

Digitized by Google

were furnished at different times and were rendered necessary by different conditions. A running account is deemed an entire contract, and for the purpose of fixing the time for filing the account to perfect a mechanic's lien, each item of the account relates to the last item delivered. [Stine v. Austin, 9 Mo. 558; Phillips on Mechanic's Liens, sec. 325; Big Horn Lumber Co. v. Davis, 14 Wyo. 455.] There is no doubt but that the account in this case was a running account. It was a mutual account between buyer and seller in which was charged from time to time, as ordered, the materials sold, and on which was entered the various credits to which the seller was entitled by reason of payments made and articles returned. [7 Words and Phrases, 6277.] Of course, if the materials were sold under separate and distinct contracts, then the mere fact that they were all charged in the form of a running account would not make them lienable under one contract. But, unless there is evidence to show a separate and distinct contract as to the last items, the account will be taken and considered, as it appears to be, a running account arising under and by virtue of the contract out of which the account originally grew.

In discussing the question when materials are to be considered as having been furnished under an entire or under separate and distinct contracts, Phillips on Mechanic's Liens, section 229, mentions several circumstances as marks to determine the matter. If the work is *distinct in its nature,* and is performed at different times, or, if two *distinct contracts* are in fact made, for *different parts of the work,* these are marks to show that there was not one entire general contract covering the whole account. "But when material is furnished, *all going to the same general purpose,* as the building of a house or any of its parts, *though such work be done or ordered at different times,* yet if the several parts form an entire whole, or are so

Digitized by Google

connected together as to show that the parties had it in contemplation *that the whole should form but one, and not distinct matters of settlements,* the whole account must be treated as a unit, or as being but a single contract." [Phillips on Mechanic's Liens, sec. 229.] And in Bruns v. Braun, 35 Mo. App. 337, l. c. 344, it is held that if a vendor should agree with the owner to furnish all the materials in the construction of a building, and after the work had progressed the owner should conclude to make changes in his original plan, or use some materials different from that originally contemplated and should even agree as to the additional cost of construction, or if they should agree to leave that for adjustment on a settlement, it could not be held that the additional materials were furnished under a separate and distinct contract, although they may have been ordered at different times. Where materials are furnished as the same are required without any specific agreement as to amount or the time within which they are to be furnished, and the items bought from time to time form parts of a connected whole in the building to which they are furnished, and there is nothing to indicate that the work is completed so as to lead the vendor to believe the account is ended and no further material will be required of him, the vendor is entitled to a lien as under an entire contract. [2 Jones on Liens, sec. 1435.] Where it is specially agreed or impliedly understood between the parties that the account is to be kept open and continued as one and the same continuous transaction and course of dealing, the account will be considered as one continuous account and one demand, and it is immaterial that the furnishing of the articles may have extended over a long period, or that several months may have elapsed between two items of the account. [2 Jones on Liens, sec. 1435.] Even where materials have been furnished confessedly after the substantial completion of the building, yet, if the work was nec-

Digitized by Google

essary to the comfortable and proper use thereof, and the materials were not furnished for the mere purpose of preserving a lien, but were reasonably within the purview of the original contract, and no rights of third persons have intervened, the final furnishing of materials is regarded as sufficient to preserve the lien. [2 Jones on Liens, sec. 1444.]

What, now, are the facts in this case bearing on the question of whether the materials were furnished under one entire contract or under two separate and distinct contracts? The contract for the materials was made between Larsen, appellant's general manager, and W. F. Lyons, who was the president and the owner of practically all the stock in the W. F. Lyons Ice & Power Company. As stated, the intention was to build an ice manufacturing and meat packing plant. Appellant was informed of this, and it was agreed that Lyons would order whatever materials were needed from time to time and that appellant would furnish them. While some of the material was on a list which the two above named men had, yet it was understood between them that this list did not contain all the material wanted, and in fact a great portion of the material never was on any list but was furnished as called for. The material was not furnished according to plans or specifications of the buildings. While Lyons had plans and specifications from an architect by which he proceeded to erect the buildings, yet the contract for the purchase of the materials said nothing about any plans, and appellant never saw them. Neither was the contract limited to any definite or lump sum, nor was any time specified when the account was to close and become due. Both Larsen and Lyons testify to all this, and, as no one else was present, there is no one to dispute the nature of the contract. Neither is it necessary to rely on any inference or presumption arising from the after occurring facts, since in the face of this clear and un-

Digitized by Google

disputed contract there is no room for inference or presumption. The erection of the buildings was proceeded with from the time of the contract, and appellant furnished materials from time to time as they were ordered. At the end of each month bills for the amount furnished to that date were rendered and payments were made on the account from time to time. Before the plants were finished, the company moved into the building and began operations, and appellant continued to furnish materials long after such occupancy and operation. They continued to be furnished down to May 3, 1909, when the packing part of the plant shut down, but the ice making part continued in operation. No materials were ordered between May 3, 1909, and sometime in October of that year, nor were any furnished during that time, and consequently there is a break in the continuity of the dates of furnishing the items from May 3, 1909 to October 9, 1909. At the time Lyons ceased ordering in May, 1909, it is important to note that *the building was not complete,* there was no termination of the account, and no announcement of the completion of the building. Neither was there any settlement between appellant and the Lyons Ice & Power Company, or determination of the amount due thereon. Appellant was asking for payments to be made on the account, it is true, but this had been done all along and payments had been made from time to time prior to May 3, 1909. Nor did appellant at any time declare the account ended and refuse to extend credit further. Both Lyons and Larsen testify to this.

The packing part of the plant shut down in May, 1909, on account of lack of money to operate it. About October 1, 1909, the Lyons Ice & Power Company leased the packing part of the plant to the Indianapolis Abattoir Company. That company required the Ice & Power Company to finish up as a tallow cooling room a certain portion of the space in the building

Digitized by Google

which had been intended for a hog cooling room but which had not been finished for that purpose, and was used as an office by the Ice & Power Company. In other words, the room in question was intended for a hog cooling room but had not been finished up for that purpose, and the Ice & Power Company was required to finish it for a tallow cooling room when it was leased to the Indianapolis Company. The only difference between the two cooling rooms would be that the ceiling in the room used as a hog cooler would have to be higher than if the room was used as a tallow cooler. To finish it either way required the same materials as were furnished in the last items. It was for the purpose of finishing up this unfinished, intended, hog cooler room as a tallow cooler that the two last items in the account dated October 9, and October 12, 1909, respectively, were furnished. There was some other work to be done by the Ice & Power Company in order to make the plant suit the Indianapolis Company, and also some which the Indianapolis Company was to do at its expense, but as no items for this other work entered into the account sued on, this other work is immaterial except as showing the reason for Mr. Larsen's going out to the plant at the time work was resumed on the building in October, 1909. He went out there, not for the purpose of making a new contract with the Lyons Ice & Power Company, but to give to the president of the Indianapolis Company an estimate of what the material would cost to make the necessary arrangements it was to do at its expense. There is no testimony that any new or different contract was entered into between appellant's manager, Larsen, and the Lyons Ice & Power Company. The two items of October 9 and October 12, 1909, were sold on credit for use in finishing up the cooling room and was charged on the account as the other items were charged, and were no different from what would been needed had the room been finished

Digitized by Google

as a hog cooling room. And the court, in its findings of fact, states that these items were not charged to the account by appellant for the purpose of extending the time for filing its lien but were sold in good faith for the purpose of being used, and the same were used, in the construction of the building in question. If they were sold in good faith as a part of the running account between appellant and the ice company, and to be used in completing the building, then, appellant ought not to be deprived of its lien on the ground that the last two items were sold under a different contract unless there was a new and distinct contract entered into between the parties, or sufficient notice brought home to appellant that the materials were ordered under a different contract or were for such an entirely different purpose that they could not be considered as a part of the original contract. In this case there are no equitable rights of others to intervene. The defendant owner and the holders of the deeds of trust thereon knew, before their interests therein came into existence, that the amount of appellant's account for which it sues was unpaid and that a lien therefor would be claimed.

But respondent contends that when the Ice & Power Company began ordering materials in October, it paid cash for a part of what it then bought and this fact creates a new and distinct contract different from the one under which the former items were sold, which new contract includes the two items which were sold on credit and charged. It is undisputed, however, that appellant did not demand cash. Larsen testifies that he never refused to extend credit and Lyons says the only reason he paid cash was, not because Larsen demanded it, but because the account was already so large, and a payment had not been made thereon for so long a time, that he did not feel like ordering more stuff without paying for it as he got it. As the appellant received cash for certain items no bookkeeping

Digitized by Google

was done as to them and hence they do not appear on the account. But the evidence is uncontradicted that the two last items were ordered and used, that no cash for them was demanded, and that no cash was ever paid therefor, but that they were sold and charged as other items had been. It clearly appears that the two last items were used within the purview of the purpose contemplated by the parties in entering into the contract at first. But it does not clearly appear what the *cash* items were used for. For aught that we know, these cash items may have been for materials necessary to make the *alterations* demanded by the Indianapolis Company and which could not be considered as going into the erection of the building as contemplated by both parties at first. We do not say that, if they did, this would make them the subject of a separate and distinct contract, but, if they were for a different purpose than that within the purview of the original contract, then the fact that they were purchased and paid for in cash would not have the effect of causing other items, clearly within the original contract and not paid for, to be held to have been purchased under the separate contract. The mere fact that one who has purchased goods on a running account buys a few articles on a cash basis, at *his* suggestion, will not cause articles purchased later on credit, *and for the original purpose*, to be deemed to have been purchased under a new and distinct contract. And the fact that the vendor, acting in accordance with the suggestion of the vendee, sells certain items on a cash basis, will not change the rest of the account, sold thereafter as before, to a different contract. The statute makes no such limitation, but merely requires that if the materials were sold "under and by virtue of one contract" and were used in the erection of the building contemplated by the parties, and a lien claim was filed within a certain time after the indebtedness accrued, then a lien should be had. We

Digitized by Google

think the evidence all showed this, and that there was no evidence to the contrary. It showed that the materials were all furnished for the same building in installments and at intervals, and the parties intended them to be included in one account and final settlement, and such was the contract expressly entered into by Larsen and Lyons. In such case the entire account will be treated as a continuous and connected transaction and the lien limitation will begin to run from the last item of it. [Darlington Lumber Co. v. Harris, 107 Mo. App. 148, l. c. 155.] The evidence being uncontradicted that no new contract was demanded by appellant or made between the parties empowered to make it, appellant ought not to be deemed to have sold the last items under a new contract and thereby lose its lien and consequently its money, unless the evidence clearly shows there was a new contract. The case is not like those where materials were furnished without original specific agreement, or where work different and *distinct in its nature* is done and the materials relied upon to save the lien were sold for such distinct work; nor is it like those where the work *has been completed* and extra work is required. In this case the materials were all clearly purchased and used for the same general purpose originally contemplated; there was no finishing of the building, nor was there any recognition that the account was closed by either party. Neither was there a refusal to extend credit further. Both Lyons and Larsen, the men who had the authority to, and did, make the contract say there was no refusal. And the fact that credit was in fact afterwards extended shows that there was no refusal to sell further on credit. The testimony of Fowler, one of the carpenters working about the building, that "I think Mr. Larsen and I understood each other that the stuff was to be cash," was nothing more than a mere conclusion, and would not warrant a finding that a new contract was made. Besides, Fowler

Digitized by Google

was not making a contract. He was merely ordering the lumber as needed. Neither could Larsen's remarks, when told by Fowler that the materials needed for the *alterations* required by the Indianapolis Company would be cash, to the effect that "he supposed I understood that the Lyons Ice & Power Company owed them quite a large bill that was unpaid, and he didn't suppose the firm would want to extend the credit further" be construed into a demand that a different contract be made. At most it was but assenting to the proposition stated by Fowler and the expression of a desire that the bill would not grow too large.

The respondent urges that no lien ought to be given because the prices charged on some of the items were greater than agreed upon. The evidence shows that if there was any overcharging it was unintentional, at least it conclusively appears that there was room for an honest difference of opinion as to the prices to be charged. Much lumber was bought in addition to the first list. It is also clearly shown that, if any items were overcharged, they were, and are, easily separable from the others; and as the court found that the plaintiff was entitled to a judgment for a sum less than the amount of the account, it is presumed that in doing so it made all necessary deductions on account of erroneous charges. Certainly, if there were any overcharges included in the account, the plaintiff would not be entitled to a judgment for them and the court would not render judgment for more than the amount due under the contract. Besides, the court did not refuse the lien on this ground but on the sole ground that the last two items were furnished under a separate and distinct contract. There being no evidence from which it could correctly draw such a conclusion, the case is reversed and remanded with directions to enforce the judgment as a lien upon the building and premises described in the petition. All concur.

Digitized by Google

CHARLES B. PORCH, Respondent, v. JOSEPHINE POLLOCK, Appellant.

Kansas City Court of Appeals, November 3, 1913.

1. **ACCOUNTS: Proof: Value.** In an action on an itemized account if there is no proof of the value of the items the case must fail, even though it is shown the items were furnished.
2. **———: ———: ———: Conversion: Value.** Even if an action on an itemized account can be considered as a statement in conversion before a justice of the peace, there must be some evidence of the value of the thing converted.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate,* Judge.

REVERSED.

Pope & Lohman for appellant.

F. E. Luckett for respondent.

ELLISON, P. J.—Plaintiff brought this action before a justice of the peace on an account for twenty-five dollars. The judgment on appeal to the circuit court was for him in that sum.

The following is the account:

Josephine Pollock, Dr., To Charles B. Porch, Cr.

October, 1911, seed wheat,	$9.25
October, 1911, to team hire	8.00
October, 1911, to drilling wheat	2.00
October, 1911, to labor	9.75
Total	$25.00

The plaintiff himself was the only witness in the case. He testified that the defendant, Mrs. Pollock, employed him in the fall of 1911 to put three and one-half acres of land belonging to her in grass. He

Digitized by Google

was to sow it in grass and also with wheat, she to furnish the grass seed and he the wheat seed. And as compensation he was to have all the wheat crop, for thus seeding the ground in grass. He prepared the ground and sowed the two seeds, "and," as he stated, "it went on until the next following spring" when she "sold and disposed of the wheat crop all together with the place," the purchaser taking possession and plowing up the ground.

At this the case stopped midway. It fails to sustain the judgment in any way it may be taken. If considered as an ordinary account, the items of which are above set out, it was not proven. There was no evidence of the quantity or value of seed wheat; no evidence of the hire of a team, or what it was worth; nor was there any evidence of the value of drilling wheat or of the labor.

Even if the growing wheat be considered as personalty and that plaintiff was guilty of conversion in selling it as her own; and conceding a suit in conversion could be stated in the form of an account in which this appears, containing no statement of the facts of the case, yet there was no evidence of its value.

The judgment must be reversed. All concur.

J. M. WHITELOCK et al., Respondents, v. W. B. BEACH, Appellant.

Kansas City Court of Appeals, November 3, 1913.

1. **CONTRACT: Pleading: Modification.** In an action on a contract which has been modied, the petition should declare on the contract as modified.

2. **———: ———: ———: Variance.** Where a petition declares on a certain specific contract and the evidence shows another substantially different agreement, there is a fatal variance.

Digitized by Google

3. ———: ———: **New Matter: Plaintiff's Showing: Avoidance.** Where the contract in suit once existed, but has been avoided by matter subsequently arising, this is new matter and must be pleaded by the defendant. But though the contract once existed, if it shows on its face that it has been avoided, as, for instance, if the time for its performance has expired, or if the plaintiff himself shows by evidence that it has been avoided, his case fails and there is no necessity for defendant pleading the avoidance.

Appeal from Adair Circuit Court.—*Hon. Nat. M. Shelton,* Judge.

REVERSED AND REMANDED (*with directions*).

Higbee & Mills for appellant.

J. A. Cooley, and *Weatherby & Frank* for respondents.

ELLISON, P. J.—Plaintiffs, Whitelock & Gregory, real estate agents, and defendant had a contract wherein the former were engaged to sell the latter's farm in Adair county at eighty dollars per acre, for which they were to receive two dollars per acre as their commission for making a sale. Their agency was limited to three months. It appears that one Johnson became interested with Whitelock & Gregory in an effort to make a sale and he is made a party plaintiff.

Finally, after the time limited in the contract had expired, a sale or exchange was made to Gelbach, the latter putting in his farm and paying defendant $10,500 in money. There is some controversy between the parties concerning the sale, which will not be necessary to notice.

This action was brought on the original contract and plaintiffs seek to recover a commission of two dollars per acre as agreed in that contract. On a trial with the aid of a jury a verdict was returned for the defendant. Thereafter plaintiffs asked a new trial,

Digitized by Google

which the court granted, and from that order defendant appealed.

The evidence showed that after the expiration of the time limited in the original contract the parties entered into a new contract whereby the time of plaintiffs' agency was extended; and there was evidence tending to show the terms of sale were changed to seventy-five dollars per acre with a commission of one dollar per acre, and the court gave an instruction for defendant that if the jury believed the latter contract was made the verdict should be for defendant. The court afterwards concluded that since defendant's answer was merely a general denial, it erred in giving that instruction, and that was assigned as the reason for granting a new trial.

Since the sale or exchange was made several weeks after the contract sued on had expired, it became nullified by its own limitation. The petition, based solely on the contract, while setting out its terms and a sale, adroitly omits to allege the *date* of the sale. If it had done so it, of course, would have affirmatively shown there was no cause of action. But when plaintiffs came to show their case in evidence they showed the contract as declared upon, but also showed the sale was made after that contract had become of no effect. They sought to avoid this self-destruction by showing another contract extending the time of the original. This, if viewed as a modification of the contract, should have been pleaded, since that was vital to a cause of action. [Lanitz v. King, 93 Mo. 513; Koons v. Car Co., 203 Mo. 227, 259; Merryman v. Buddecke, 243 Mo. 205, 216; Brownlow v. Wollard, 61 Mo. App. 124, 132; House Wrecking Co. v. Sonken, 152 Mo. App. 458.] Plaintiffs insist it was not intended as a modification of the contract. If it should be granted that it was not a modification, yet the proof of it amounted to a fatal variance. As stated by the Supreme Court in Merryman v. Buddecke, 243 Mo.

Digitized by Google

205, 216, it was a suit upon one proposition and an attempt to recover upon another. So in either event plaintiffs' case failed, and the verdict was for the right party.

Plaintiffs seem to rely on that class of authority to the effect that if a cause of action once existed and new matter has since arisen which avoids it by way of defense, such new matter must be pleaded by the defendant in order that he may introduce evidence of it. [Northrup v. Ins. Co., 47 Mo. 435, 444; Jones v. Rush, 156 Mo. 364; Cushing v. Powell, 130 Mo. App. 576.] But this is not a case of that nature. This case, as put before the court by plaintiffs themselves, is one in which defendant did not need a defense. They stated a contract which, connected with their own evidence, was not performed by them. Then to avoid that predicament they (not defendant) claim a right to show it had been changed.

The judgment will be reversed and the cause remanded with directions to reinstate the verdict and render judgment for the defendant. All concur.

S. C. BOYD, Appellant, v. BANK OF MERCER COUNTY, Respondent.

Kansas City Court of Appeals, November 3, 1913.

1. **SALES: Personal Property: Cash: Title.** As between the parties, a sale of personalty for cash does not pass title to the property if the money is not paid by the buyer.

2. **———: ———: ———: Bill of Lading: Check for Purchase Money: Transfer of Bill: Value not Paid.** A seller and purchaser resided twelve miles apart. The seller, at the direction of the buyer, loaded a car of corn at the seller's residence, for shipment to market, and took from the railway company a bill of lading in the buyer's name. He then sent the bill of lading to the buyer by mail together with the weight of the corn,

Digitized by Google

showing that it came to $575 at the purchase price per bushel. It was agreed the buyer, on receipt of the bill, should send his check in payment by mail to the seller. The buyer did not do so, but immediately upon receiving the bill transferred it, with a draft attached for $575 to a bank at his place, the latter entering that amount on its books as a credit to the buyer. The bank had no notice that the seller had any interest in the corn, but it did not pay out any money for the bill; on the contrary collected the proceeds of a sale of the corn. *Held*, that the sale was for cash, and that no title passed to the buyer and that the bank was liable to the seller for the purchase price.

3. ———: ———: ———: **Bill of Lading: Negotiable: Notice: Value.** While a bill of lading is negotiable and its transfer will take the title to the property, it will not have that effect if the transferee has notice of lack of title; or, pays nothing for it.

Appeal from Mercer Circuit Court.—*Hon. Geo. W. Wanamaker*, Judge.

REVERSED AND REMANDED (*with directions*).

A. G. Knight for appellant.

E. M. Harber, Ira B. Hyde, A. M. Hyde and *E. R. Sheetz* for respondent.

ELLISON, P. J.—Plaintiff lives at Cainsville and defendant bank and a business institution known as Farmers Elevator & Supply Company are located at Princeton, twelve miles away. Plaintiff bought corn of farmers near the former place, paying them in checks on a bank in Cainsville. He had an arrangement with the Elevator & Supply Company whereby he sold corn to it. The delivery and mode of payment were that plaintiff would have the corn weighed and loaded for shipment in a railway car at Cainsville to the point designated by the Elevator & Supply Company taking a bill of lading in name of the Elevator & Supply Company and mailing it, with the weights,

Digitized by Google

to that company at Princeton, and the latter, on receipt, would send him a check for the purchase price.

In the instance resulting in this action, plaintiff, on the 25th of June, 1912, had a lot of corn weighed and loaded in a car, taking a bill of lading (destination St. Louis) in the name of the Elevator & Supply Company. He mailed this to that company at Princeton, but the company failed to send plaintiff its check for the price. It took the bill of lading with a sight draft attached on a party in St. Louis for $575, to the defendant bank and indorsed it to the bank, receiving credit on the books of the bank for that amount. The bank stopped payment of the draft, had the corn sold after its arrival in St. Louis, and received the proceeds. The Elevator & Supply Company was wholly insolvent. The bank did not pay out any money for the bill of lading, or on account of the credit thereof.

In these circumstances plaintiff demanded of the defendant the $575 represented by the bill of lading, and being refused he instituted this action. The case is made to turn on the question whether the transaction shows a sale of the corn by plaintiff for cash. If it does, no title passed to the Elevator & Supply Company and none passed on its transfer of the bill of lading to the bank, unless, of course, the latter was an innocent purchaser. [Johnson Brinkman Co. v. Central Bank, 116 Mo. 558; Strother v. McMullen Lumber Co., 200 Mo. 647.]

While the bill of lading was sent to the Elevator & Supply Co., yet that was for the reason that the parties living at places twelve miles apart, it was necessary that the bill, with the weights of the corn, should be sent to that company so that it might know the corn had been delivered into the car at Cainsville for shipment, and be informed of the amount it was to pay. We think the evidence makes clear that the sale was a cash sale and the fact that payment was to be by

Digitized by Google

check did not change its character. A case in this respect like this, in essential particulars, was decided by the Springfield Court of Appeals in an opinion by Cox, J., and it fully and clearly bears out our construction of this contract and statement of the law applicable thereto. [Wright v. Trust Co., 144 Mo. App. 640.]

We are cited to Bank v. Smith, 107 Mo. App. 178, and Smith v. Bank, 120 Mo. App. 527, but we do not see where they in any way sustain the defense. So we are cited to Bank v. Milling Co., 163 Mo. App. 135, and likewise find it does not affect this case. We recognize all the rights of seller and purchaser of a bill of lading under sections 11956 and 11957, Revised Statutes 1909, and the effect of the transfer of the bill in passing title. The negotiation of such bill will transfer the title to the property shipped, to a purchaser for value without notice, even if the seller himself has no title as between him and the person from whom he bought. But in this case defendant, as stated above, though ignorant that plaintiff's sale to the Elevator & Supply Co. was a cash sale, did not pay anything to that company for the bill of lading. All defendant did was to enter a credit on its books to the company, which was not afterwards honored. In such circumstances defendant has no right to resist plaintiff's recovering the proceeds of the property, the title to which had not passed from him.

It was shown that on the day of the deposit defendant's books showed a balance of account against the Elevator & Supply Company of $7.51. Viewing the facts in one way, defendant also paid out on the company's account after its receipt of the deposit, the sum of $19.96. Plaintiff appears to make no particular objection to these items, amounting to $27.47, and we will therefore allow them to defendant as a credit.

We note that defendant had other dealings with the insolvent Elevator & Supply Company, which had

Digitized by Google

no connection with plaintiff, whereby that company by its fraud became largely indebted to defendant. But this was not known to it when the matters here litigated transpired, and is conceded to be immaterial except, as stated in the briefs, to show defendant's good faith in the controversy.

The judgment will be reversed and the cause remanded with directions to enter judgment for plaintiff, less the credit. All concur.

KERNS & LORTON, Respondents, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

Kansas City Court of Appeals, November 3, 1913.

1. **TELEGRAPH AND TELEPHONES: Delay: Rise in Price: Measure of Damages.** A telegram sent from Kirksville, Missouri, to Romeo, Michigan, directed a person at the latter place to buy 600 bushels of potatoes at fifty cents per bushel and ship to the senders at Kirksville. The telegram was negligently delayed in delivery for two days, when potatoes had risen in price to eighty cents per bushel. It was *held* that on proof that the potatoes could and would have been bought at fifty cents if the message had been delivered, and that the price had advanced when it was delivered, the telegraph company would be liable for damages measured by the difference in price at the place of purchase.

2. **———: ———: Negligence: Necessity for Purchase.** While generally it is true that a telegraph company negligently failing to deliver a telegram directing the purchase of merchandise, is liable for the difference in price at which the articles could have been purchased had there been prompt delivery, and the advanced price at which they were afterwards purchased—yet it is not necessary that a purchase be afterwards made, unless it will save or reduce the damages. For, if it be shown that a purchase would have been made at the lesser price if there had been prompt delivery and that when the belated delivery was made the price had risen, the difference between these will be a basis for assessment of damages for his loss in not obtaining the article at the lesser price.

Digitized by Google

3. ———: ———: ———: **Loss of Profits.** A telegraph company is not liable for loss of profits which might have been made out of collateral transactions, or which depend upon uncertain events. But if it is shown that merchandise ordered to be purchased by a telegraphic message were known to be intended for resale at a profit and that they could have been sold at such profit, a liability will accrue against the company.

4. ———: ———: ———: ———: **Information on Face of Telegram.** The following telegram was sent from Kirksville, Missouri, to Romeo, Michigan, and was negligently delayed in delivery, viz.: "If freight rate does not exceed fifty cents per hundred buy five or six hundred bushels of potatoes at fifty cents, if good. Make draft on us with bill of lading attached. Wire as soon as bought." *Held*, that the message conveyed information to the company, on its face, that the potatoes were desired to be purchased and shipped to Kirksville immediately and that they were intended for resale at a profit, and that the company was liable for the profit definitely shown could have been made.

Appeal from Adair Circuit Court.—*Hon. Nat. M. Shelton*, Judge.

AFFIRMED.

Fred S. Hudson for appellant.

Weatherby & Frank for respondents.

ELLISON, P. J.—Plaintiff's action is for damages alleged to have accrued to them by reason of the failure of defendant to deliver a telegram they sent from Kirksville, Mo., to E. O. Millay at Romeo, Mich. A jury was waived and a trial had by the court which resulted in a finding and judgment for plaintiffs in the sum of $180.

The telegram was delivered to defendant's agent at Kirksville, on Friday, November 10, 1911, at seven o'clock in the evening, and should have been delivered, in ordinary course, at Romeo on Saturday morning, November 11th. But it was not delivered until after

Digitized by Google

business hours on the evening of November 13th, when Millay received it through the mail. It was in the following words: "If freight rate does not exceed fifty cts. per hundred buy five or six hundred bushels of potatoes at fifty cents, if good. Make draft on us with bill of lading attached. Wire as soon as bought. Kerns & Lorton."

Plaintiffs' claim is that Millay could and would have bought potatoes on the 11th at fifty cents per bushel and could and would have obtained a freight rate to Kirksville of thirty cents per bushel. They also claimed that had the potatoes been bought and shipped at that price and rate they could and would have sold them at $1.10, thereby making a profit of thirty cents per bushel.

Defendant attacks the sufficiency of the evidence to sustain these claims. Any substantial evidence in that respect will suffice to uphold the judgment in plaintiff's favor and an examination of the record clearly shows that character of proof. Though the telegram was properly addressed by plaintiffs to Millay, it was changed to Mills. And though Millay was known to defendant's agent at Romeo, and though delivery should have been made Saturday, no personal delivery was made at all and the mail did not get it to him until Monday evening, too late for business. It is true he was absent six hours on Saturday, but this did not, as a matter of law, relieve defendant from delivering at the time he was not absent.

Defendant insists that though negligence in delivery be conceded, there was no evidence upon which an estimate of damages could be based and that the amount allowed by the trial court was merely speculation. We think the record shows the court was well justified in its conclusion. It was shown in plaintiff's behalf that if the telegram had been delivered potatoes could and would have been bought at fifty cents per bushel and shipped at a freight rate of thirty

Digitized by Google

cents. It was further shown that such potatoes could have been sold at $1.10 per bushel. There was no element in this which could legally be classed as speculative.

But it is said that though there was negligent delay in delivery, it was the duty of plaintiffs to minimize their damages by purchasing and shipping potatoes after receipt of the telegram. While it is the duty of one whom another has injured to make reasonable effort to save himself what he readily and reasonably may (Douglass v. Stephens, 18 Mo. 362; Reynolds v. Tel. Co., 81 Mo. App. 223), we do not find that the court was bound to find such condition or situation existed. But this suggestion makes it necessary to consider the proper measure of damages, and that is really the only difficult question in the case. No instructions were asked and we must, therefore ascertain if the record contains facts which will support the judgment.

Generally expressed, the measure of damages is the difference between the price that the sender of the message agreed to pay for the merchandise and the sum which he would have been compelled to pay at the same place, in order, by due diligence, to have purchased the like quantity and quality of the same species of merchandise. [Western Union Tel. Co. v. Askew, 92 Ark. 133; Western Union v. Hall, 124 U. S. 444; Squire v. Western Union, 98 Mass. 232; True v. Tel. Co., 60 Me. 9; Brewster v. Tel. Co., 65 Ark. 537.]

This statement of the rule of damages is founded upon the duty of the injured party to minimize his loss and it is varied in some instances where the facts of the particular case justify it, by the statement that the damage is the difference between the price the sender of the message was to pay if the delivery had been promptly made and the price he afterwards *actually* did pay. From this variance in statement defendant has insisted that since Millay did not make a

Digitized by Google

purchase plaintiffs are not out any money and therefore there is no data wherefrom to ascertain the difference in prices. But if the facts in the given case show that the price which the intending purchaser would have been compelled to pay on a subsequent day was higher than the price he would have paid had his telegram been delivered in proper time, we can see no necessity for having him go through the form of actually buying in order to ascertain his loss. If the proof shows he would have bought at the price named in the message, if it had been delivered in time, he would have secured property at a less price than its value subsequently when the message was delivered and he is entitled to compensation for that difference.

Again, defendant insists that in fact these rules of measurement of damage were not followed by the court, but that speculative profits which plaintiffs might have made have been taken as the basis for the judgment. The trial court may have considered the case from the standpoint of profits which would have been made on resale and we will therefore consider that phase of the case. Profits which are a matter of guess are too problematical as a measure of damage, but they may be brought within the limits of reasonable certainty and thus become the basis of an action. This we held in a recent case written by Judge TRIMBLE, in a controversy between the parties now before us: Kerns & Lorton v. Western Union Tel. Co., 170 Mo. App. 642. Here there was sufficient evidence (outside of the terms of the message itself) to uphold a finding by the court that these potatoes were to be bought by plaintiffs for resale on their arrival at Kirksville. It was shown that they had contracted a sale of one-half of the entire lot at $1.10 per bushel. In such circumstances we think loss of profits is made sufficiently certain and the judgment can be upheld on that ground; the case, we think, is brought within the exception noted by Justice MATTHEWS in Western Union v. Hall,

Digitized by Google

supra, at the close of the opinion and in Western Union v. Fellner, 58 Ark. 29; Jones on Telegraph & Telephone Companies, secs. 546-549, wherein it is stated that if the purchase intended was for immediate resale at a profit which was shown could have been made, such profit was a proper measure of damage.

But a telegraph company should be able to see and understand its importance from the telegram itself or from information otherwise given to it before a liability can attach for substantial damages. [Fitch v. Tel. Co., 150 Mo. App. 149.] In other words, the message itself, if not otherwise known, should disclose to the company the nature of the transaction contemplated and the reasonable probability of loss if negligence follows. [Melson v. Western Union, 72 Mo. App. 111.] It may therefore be suggested that the message was not such as to sufficiently advise defendant, as it should, of the probable or reasonable consequences which would follow from its negligence. [Fitch v. Tel. Co., supra.] Referring to the language of the message, as set out above, we think the meaning is clear that plaintiffs were ordering a purchase of a large quantity of potatoes at a certain price, to be shipped to them and that they were to be immediately notified as soon as the purchase was made. The fact that a business firm were the senders and that the order was for so large a quantity of such character of merchandise (beyond the necessity for individual consumption) with direction for immediate notice of purchase, could not, in reason, fail to impress defendant with the fact that it was a purchase for resale and, of course, at a profit. In Jones on Telegraph & Telephone Companies, secs. 535, 536, many illustrations are given sustaining our conclusions.

The judgment should be affirmed. All concur.

Digitized by Google

LEE MARTIN, Respondent, v. FARMERS COAL COMPANY, Appellant.

Kansas City Court of Appeals, November 3, 1913.

1. **NEGLIGENCE: Coal Mines: Drivers.** The plaintiff sued to recover personal injuries sustained while being employed as a driver in the defendant's coal mine. The mine is what is known as a drift mine. The plaintiff drove in a load of empty cars, and proceeded to hitch his mule to a loaded train, which was beyond the empty train. Before he started out another driver dumped his empty train on top of the one that the plaintiff left, leaving one of the cars obstructing the track. The lights were very dim on account of the bad air in the mine and the plaintiff on his outward journey with his loaded train failed to see the obstructing car and his foot was crushed between it and the one on which he was riding. *Held*, that the demurrer to the evidence was properly overruled, the question of contributory negligence being an issue of fact for the jury to determine.

2. **EVIDENCE: Contributory Negligence: Illumination.** It is not error to admit evidence tending to show that there was bad air in the mine which greatly diminished the illuminating power of the lights carried by the miners and those maintained in the mine by defendant, when such evidence has a direct bearing on the issue of contributory negligence.

3. **———: Relevant and Material: Admissibility.** Evidence that is competent, relevant and material on a contested issue is always admissible whether or not it would tend to support a different cause from that pleaded in the petition. The proper practice is to admit the evidence and by instruction restrict its scope to the issues made by the pleadings.

4. **INSTRUCTIONS: Facts not Essential: Reversal of Judgment.** Where an instruction requires a plaintiff to establish a fact not essential nor even pertinent to his cause of action it is error, but if it is against the plaintiff alone and harmless, it does not constitute a good ground for the reversal of a judgment.

Appeal from Lafayette Circuit Court.—*Hon. Samuel Davis*, Judge.

AFFIRMED.

Digitized by Google

Chiles & Chiles for appellant.

Charles Lyons and *Alexander Graves* for respondent.

JOHNSON, J.—Plaintiff was injured while employed in a coal mine operated by defendant in Lafayette county and prosecutes this action to recover his resultant damages on the ground that his injury was caused by negligence of defendant. A trial of the issues raised by the pleadings resulted in a verdict and judgment for plaintiff in the sum of $550 and the cause is here on the appeal of defendant.

The mine in which plaintiff was employed is what is known as a drift mine. Its main entrance horizontally penetrated a hillside and diverged into several branches leading to different places where coal was being mined. There was a double track railway in the main entrance and a single track railway in each of the branch passageways. At the end of each single track there was a short switch track on which empty coal cars or boxes, as they were called by the miners, would be placed until they were required to be loaded with coal. Mules were used to haul in trains of empty cars and bring out trains of loaded cars. Plaintiff was employed as a driver and shortly before the injury took in a train of empty cars to the end of one of the single lines and, finding no room on the switch track, he removed them from the main track to a vacant space between that track and the wall. Then he proceeded to hitch his mule to a train of loaded cars standing on the main track a short distance beyond the place where he had dumped the empty cars. Before he started out with the loaded train another train of empty cars came in and the driver dumped his cars on top of those left by plaintiff but in such manner, so plaintiff contends, that one of the cars obstructed the track. Plaintiff states that on account of bad air

Digitized by Google

in the mine the lights were dim and while he saw the last train come in and saw the driver dump the cars, he did not and could not see that one of them had been left in a position to obstruct the free passage of the loaded train. Plaintiff seated himself on the front end of the first loaded car near the middle with his left leg drawn up under him and his right leg hanging down in front. The obstruction did not interfere with the progress of his mule but it struck the front end of the train and crushed plaintiff's right foot and ankle. The track was about two feet wide and the cars extended out about eight inches on each side. The cars when empty weighed about 240 pounds and when loaded from 1200 to 1800 pounds. The method of dumping cars in the space at the right of the track was that usually pursued in the mine when the switch track became full and the negligence on which plaintiff founds his cause of action is the act of his fellow-servant in dumping and leaving a car in a position to interfere with the free passage of trains on the main track.

The petition alleges "that defendant, its agents and servants, at this time had carelessly and negligently obstructed the track on which plaintiff was then driving said load of coal by leaving partly thereon an empty car which it was defendant's duty to have entirely removed so as to allow free passage to the loaded car in the charge of plaintiff and that defendant knew or by the exercise of ordinary care and caution could have known that said empty car was partly on said track and that said track was thereby obstructed and likely to produce the injuries hereinafter named; that the plaintiff relying upon a clear track ahead drove his loaded car forward into darkness, resulting in a violent collision between the two coal cars whereby plaintiff's right leg was caught between the said cars and the bones thereof were broken and crushed in three places and the ankle and ligaments torn and wrenched whereby plaintiff is permanently

Digitized by Google

injured. Plaintiff avers that he was in the exercise of ordinary care and caution during the entire time and that said accident and said injury were caused solely by said negligence and carelessness of defendant, its agents and servants."

Defendant insists that the court erred in refusing its request for a peremptory instruction.

The evidence of plaintiff will support a reasonable conclusion that his injury was caused by negligence of his fellow-servant, the operator of the second train of empty cars, and defendant became liable to plaintiff for the damages he sustained in consequence of such negligence. Section 5440, Revised Statutes 1909, provides that "every person, company or corporation operating a mine or mines in this State producing lead, zinc, coal or other valuable minerals, shall be liable for all damages sustained by any agent or servant thereof while engaged in operating such mine or mines, by reason of the negligence of any other agent or servant thereof: Provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury."

Defendant does not contend that no negligence for which it would be liable is disclosed by plaintiff's evidence, but does argue that plaintiff was guilty in law of contributory negligence that should preclude him from maintaining this action. We think the question of his contributory negligence is shown by the pleadings and evidence to be an issue of fact for the jury. The darkness at the scene of the injury appears to have been of a degree that enabled plaintiff to note the general operations of the second train but not to discover that one car had been left in a dangerous position. We cannot say that he would have discovered the position of that car had he made reasonable use of his eyes. Whether he would or not was a question for the jury. Nor can we say that he assumed a more dan

Digitized by Google

gerous position than was necessary in riding with one leg hanging down in front of his car. The evidence shows that he rode in the usual place on the train and in the customary way, and we think that no issue either of law or fact may be predicated of the method of work he followed.

The demurrer to the evidence was properly overruled.

Complaint is made of the admission of evidence tending to show there was bad air in the mine which greatly diminished the illuminating power of the lights carried by the miners and maintained in the mine by defendant. This evidence had a direct bearing on the issue of contributory negligence and was properly admitted. In an instruction given at the request of defendant its scope was expressly restricted to that issue and the contention that it enlarged the cause of action pleaded in the petition to include one falling within the purview of sections 8445 and 8447, Rev. Stat. 1909, is not well grounded. Evidence that is competent and is relevant and material to a contested issue in the case is always admissible whether or not it would tend to support a different cause from that pleaded in the petition. In such instances the proper practice is to do what was done in this case—receive the evidence and by instruction restrict its scope to the issues made by the pleadings.

Instruction numbered 2, given at the request of plaintiff is subject to the criticism that it required the plaintiff to establish a fact not essential nor even pertinent to his cause. It was immaterial whether the defect had existed a sufficient time for defendant to have discovered and removed it. The gist of plaintiff's cause was the act of a fellow-servant in negligently creating the defect, not the omission of the master to exercise reasonable care to maintain the servant's place of work in a reasonably safe condition. The error, however, being against plaintiff alone, was harmless

Digitized by Google

and, therefore, cannot be regarded as a good ground for a reversal of the judgment.

There is no prejudicial error in the record and the judgment is affirmed. All concur.

NELLIE E. WRIGHT, Respondent, v. WABASH RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, November 3, 1913.

1. **DAMAGES: Railroads: House Tracks: Obstructions in Public Streets: Abutting Property Owner.** The plaintiff sued to recover damages for the erection and maintenance of a house track by the defendant on a public street adjoining her property. The municipality, by ordinance, allowed such use of the street but required the railroad company to pave it. *Held*, that plaintiff was entitled to recover, first, for the impairment of the means of ingress and egress; second, for the injury to the comfortable use and enjoyment of the premises; and third, for the destruction of her right to use the street as a temporary place of deposit for fuel and other bulky materials for use and consumption on her premises.

2. **———: ———: Grants in Public Streets: Statutes.** A railroad company has the right to lay down and use its tracks upon a street when that right is conferred upon it by the municipality, the municipality having the power delegated to it to grant that right. But the power of the municipal authorities to grant to a railroad company the right to lay its tracks along a street is not absolute. They cannot do so if the operation of the railroad will destroy the use of the street as a public thoroughfare.

3. **———: ———: Unlawful and Unreasonable Obstruction.** Where the railroad track constitutes an unreasonable or unlawful obstruction in the street, the abutting property owner may recover, from the person causing such obstruction, damages for the injury he sustains where such damages are particular, direct and special.

4. **INSTRUCTIONS: Damages: Temporary Nuisance.** An instruction which authorized the jury to allow damages that were not special to plaintiff but were common, and which permitted plaintiff to recover for depreciation in the market

Digitized by Google

value of her property caused by the nuisance as though the nuisance and its injurious consequences to plaintiff were permanent is erroneous, because the nuisance, created by the laying and maintaining of a railroad track in a public street without lawful right or authority, being subject to abatement by legal process, must be regarded as temporary.

Appeal from Livingston Circuit Court.—*Hon. Arch B. Davis,* Judge.

REVERSED AND REMANDED.

J. M. Davis & Son, J. L. Minnis and *Jones & Conkling* for appellant.

Scott J. Miller for respondent.

JOHNSON, J.—This suit is for damages plaintiff alleges she sustained from the erection and maintenance of an obstruction in the public street in front of property owned and occupied by her in the city of Chillicothe. The answer is a general denial and an allegation that the occupation and use of the street by defendant is lawful. The cause is before us on the appeal of defendant from a judgment recovered by plaintiff in the circuit court.

Plaintiff owned and occupied as her residence a house and lot fronting on First street in Chillicothe between Slack and Vine streets. First street runs east and west and is bounded on the south by defendant's railway tracks. Slack and Vine streets run north but not south from First street and do not cross the tracks. Defendant's station is a short distance southwest of Vine street and is on the north side of the main track. There was a house track on the north side of the station which, going westward, left the main track at a point seven feet west of an imaginary prolongation of the west line of plaintiff's property. Defendant's business at Chillicothe required a longer house track and in June, 1910, defendant applied to the city council

Digitized by Google

for permission to extend that track eastward along First street to a point about one hundred feet east of Slack street. There is evidence tending to show that an ordinance granting such permission was passed June 20, 1910, but no record was made of such ordinance, if, in fact, one was enacted. The city records do show that an ordinance was duly passed November 21, 1910, granting defendant permission "to construct and maintain a railroad track on First street between Vine and Slack streets, which said track is to run parallel with the main track of said company provided said company pave First street from the center line of Slack street, which paving is to be in accordance with plans and specifications furnished and approved by the city engineer." The track thus authorized had been laid by defendant in the preceding month. First street was not paved until about eight months after the track had been laid and put into service, but the delay appears to have been caused by the failure of the city engineer to furnish plans and specifications for the pavement and the work was done in a reasonable time after the delivery of the plans and specifications to defendant. The street had not been paved before and being on low ground was muddy and almost impassable in very wet weather. The substantial brick pavement laid by defendant would have enhanced the value of the street to the abutting property owners but for the encroachment of the extension of the house track. The evidence of plaintiff tends to show that the north rail of the track was laid about twelve feet from the curb line in front of plaintiff's property and that the distance narrowed going east from this point to about ten feet at the intersection of Slack street. There was a sidewalk space of six feet and eight inches between the curb and property lines but the pavement ended at the curb and, therefore, was only ten feet wide at its narrowest end. Vehicles could not pass each other or be turned around in this space, nor could they be

Digitized by Google

backed up to load or unload. There was no paving between the rails or south of the house track. Vehicles could not be driven along or across the part of the street occupied by the track and the whole of the street except the narrow pavement we have described was appropriated by defendant to its exclusive use. Moreover the house track was used almost constantly as a storage track for cars being loaded and unloaded. The presence of such cars in the street and the frequent presence on the pavement of wagons, engaged in the process of loading and unloading, greatly impaired the use of the street as a means of ingress and egress to and from the abutting property and entirely destroyed its use by the property owners as a temporary depository for fuel, building material, or other bulky materials.

The evidence of defendant describes the pavement as being several feet wider and as affording room for vehicles to pass each other and to turn around, but the evidence of plaintiff relating to the width of the pavement and the conditions produced by the construction of the new track is substantial and will be accepted as conclusive in the consideration of the questions of law raised by the demurrer to the evidence which counsel for defendant argue should have been given.

Point is made by plaintiff that inasmuch as the proof discloses the track was laid before the passage of a formal ordinance by the city council, the belated ordinance cannot be regarded otherwise than as wholly abortive, but we do not find it necessary to discuss that question and without expressing our opinion upon it we shall begin our consideration of the case by assuming, *arguendo,* that so far as the city government could confer authority on defendant to use the street for its house track such authority was granted

Digitized by Google

by ordinance duly enacted before the work was commenced.

The first question to engage our attention is that of the nature and scope of the power the city government had to grant authority to a railroad company to construct and operate a railroad track along a public street. The Supreme Court in a long line of decisions have recognized "the right of a railroad company to lay down and use its tracks upon a street when that right is conferred upon it by the municipality, the municipality having the power delegated to it to grant that right." [Rude v. City, 93 Mo. 408; Lackland v. Railroad, 31 Mo. 180; Swenson v. City, 69 Mo. 157; Cross v. Railroad, 77 Mo. 318; Gaus v. Railway, 113 Mo. 308; Brown v. Railroad, 137 Mo. 529.]

In the case last cited attention is called to the statute (Sec. 2453, Rev. Stat. 1889, Sec. 3049, Rev. Stat. 1909) which gives to railroad corporations the right to construct and maintain their roads across and along the public streets of cities, the assent of the city first being obtained and it is observed that "the exercise of the rights and powers thus conferred has received the approval of this court in many cases." But further the rule is recognized in that case that the power of municipal authorities to grant to a railroad company the right to lay its tracks along the streets is not absolute. "They cannot do so if the operation of the railroad will destroy the use of the street as a public thoroughfare."

The reason that has prompted legislative and judicial acknowledgment of the right under consideration is that since a railroad is in the nature of a public agency for the transportation of persons and property "its vehicles have the same right to use the public highways as the wagon of the farmer or the carriage of the banker. Public highways are for the use of all kinds of travelers and carriers and the law does not discriminate between the different classes of

Digitized by Google

which the general public is composed. Consequently the power of the Legislature to legislate on the subject of granting the right to railroad companies to lay their tracks in public streets is unquestioned and such right may be exercised in the manner prescribed by statute provided it be reasonably exercised. A railroad company has no right to appropriate a street to its exclusive use, to unnecessarily impair the rights of other users, nor to restrict unnecessarily the rights of abutting property owners to free ingress and egress and to such other uses of the street as are incidents to the ownership of abutting property. [State ex rel. v. Railroad, 206 Mo. 251.] The attempted grant in the present instance must be condemned as unlawful for two reasons. First it gave to defendant the right to appropriate to its own use and to the complete exclusion of all other users two-thirds of a public street under the guise of an apparently innocent grant of the right to lay a single switch track on grade and in consideration of the paving by defendant of the whole street for the benefit of the public. The narrow pavement accepted by the city as a performance of the duty imposed on defendant by the grant was a poor excuse for such manifest spoliation of the rights of the general public and of the abutting property owners. Indeed, the whole construction and the uses made of it by defendant amounted practically to a seizure of the whole street for its own uses to the exclusion therefrom of all other classes of users. In the fable the Arab's camel begged permission to put his head in the tent and obtaining it crowded in his whole body, forcing the Arab out, so in this instance, defendant asked to be allowed to use the street as one of many travelers and abused the grant of such right by taking the whole street. The second reason for condemning the grant is that the track authorized was intended to be used and continuously has been used as a house track and not as a track for the moving of trains or cars.

Digitized by Google

In Lackland v. Railroad, 31 Mo. l. c. 188, the Supreme Court, speaking of the legislative power to authorize the use of public highways by railroad companies, said "we have not observed any case even where this power is conceded which allows the erection of depots, or car buildings or any other structures, which materially obstruct the use of the street or highway as a public easement."

In Tate v. Railway, 64 Mo. l. c. 158, it is said: "It is further determined, that where the charter of the municipality so allows, a railroad may be constructed on a street by permission of the municipal authorities, and neither the municipal corporation nor the railroad company will be responsible for the inconvenience and damage resulting from such construction. [Porter v. N. M. R. R. Co., 33 Mo. 128.] But these principles apply only to a railroad constructed on the grade of the street, where the only obstruction is the passage of trains, and not where embankments have been made above the grade, or where the street is used for sidetracks or other structures for the convenience of the road. For those purposes the railroad company must procure sufficient ground, not altogether dedicated to uses entirely inconsistent with the purposes they propose to apply it."

In Donner v. Railway, 133 Mo. App. l. c. 535, we held that a municipality could not lawfully grant the power to a railroad company to so use a street as to destroy or unreasonably interfere with the right of an abutting property owner of access to or egress from his property and further held that "the street on which a railroad is constructed on grade cannot be used for sidetracks, the storing of cars, for water tanks or like structures."

In speaking of sidetracks we had in mind not passing or spur tracks used merely in the movement of trains and cars but of storage and house tracks where

Digitized by Google

freight cars are left standing. A house track whereon cars are loaded and unloaded by the patrons of the company is but an adjunct of the freight depot, a part of the company's establishment for the transaction of business with the community, an open warehouse and loading place and the maintenance of such a track in a public street cannot be regarded as a use of the street for the purposes of travel.

In Foundry v. Railroad, 130 Mo. App. l. c. 117, the St. Louis Court of Appeals, in a *dictum,* appear to overlook the distinction the Supreme Court cases recognize between passing or switching tracks on the one hand and storage or house tracks on the other, and conclude that the earlier cases, e. g., Tate v. Railroad, supra, holding that the latter class of tracks cannot be properly maintained in public streets, were overruled, in effect, in the later case of Brown v. Railroad, 137 Mo. 529. But this is not the case. The switch track under consideration in the Brown case was a spur track running along an alley, used only for the movement of cars and not as a storage or house track. The opinion states "that at the terminal of the switch provision is made for standing freight cars on *private property,* where they can be loaded and unloaded if anyone desires to use them." Since the track was used only as an instrumentality of transportation, a means by which vehicles might be moved, its presence in a public way was as legitimate as a street car track would have been. [Donner v. Railway, supra.] There is no conflict between the Brown and Tate cases.

These considerations compel the conclusion that the attempted grant by the city of authority to lay and maintain a house track in the street was void for the reasons that the grant contemplated an unreasonable appropriation of the street and, further, contemplated the use of the street for an improper purpose. The track must be regarded as a purpresture—a public

Digitized by Google

nuisance—and we pass to the consideration of the question of the right of plaintiff, an abutting property owner, to maintain an action for the recovery of the damages sustained by her in consequence of the nuisance. That the property of plaintiff has been damaged is unquestioned and unquestionable. The injury causing the damages may be separated into three elements, viz., first the impairment of the means of ingress and egress; second, injury to the comfortable use and enjoyment of the premises, and, third, the destruction of the right of plaintiff to use the street occasionally as a temporary depository of fuel and other bulky materials for consumption on the premises.

When a railroad track is laid and operated in a public street in a proper and reasonable manner under a lawful grant from the municipality, the inconveniences and annoyances to others caused by the operation of trains and cars along the street are *damnum absque injuria* for the reason that travelers and the occupants of abutting property have equal rights to the use of public ways and each must endure the inconveniences caused by the lawful exercise of the rights of others, but where the railroad track constitutes an unreasonable or unlawful obstruction in the street, as in the present instance, the rule is that the abutting property owner may recover, from the person causing such obstruction, damages for the private injury he sustains where such damages are particular, direct and substantial. [3 Dillon on Municipal Corporations (5 Ed.), sec. 1168; Rude v. City, 93 Mo. 414; Gaus v. Railroad, 113 Mo. 308; Stephenson v. Railroad, 68 Mo. App. 642; Spencer v. Railway, 120 Mo. 154.]

The right of an abutting owner to reasonable means of ingress and egress is a private right, that is to say, it is regarded as a right incidental to his proprietorship and, therefore, is different and distinct from any right enjoyed by other uses of the public

Digitized by Google

thoroughfare. [Rude v. City, supra; Dillon on Municipal Corporations, supra.] Consequently in cases such as the present where such right is destroyed or unreasonably abridged by an unlawful obstruction in the street, the resultant damages are particular, direct and special and the cases in this State recognize the right of the injured property owner to maintain an action for the recovery thereof. We conclude the court did not err in submitting the case to the jury and pass to the questions raised by defendant relating to the instructions on the measure of damages.

In the first instruction given at the request of plaintiff the jury were told "if you further find from the evidence that, by the construction and maintenance of said house track as aforesaid, the common and ordinary use of said First street, as a street, is impaired thereby, or that egress and ingress to and from plaintiff's property on First street is rendered more difficult or that the market value of the property was impaired by reason of the construction and maintenance of said house track of said railroad in the use of said house track by running cars over the same or permitting said cars to stand in front of plaintiff's property, then your verdict and finding must be for the plaintiff, in such sum as you may believe from the evidence she was damaged, not to exceed the sum of $800."

This instruction was erroneous in two respects: First, it authorized the jury to allow damages that were not special to plaintiff but were common, and, second, it permitted plaintiff to recover for the depreciation in the market value of her property caused by the nuisance as though the nuisance and its injurious consequences to plaintiff were permanent. Since, as we have shown, the track was laid in the street and is maintained without lawful right or authority, the nuisance thus created, being subject to abatement by

Digitized by Google

legal process, must be regarded as temporary. [Hamlin v. Burke Bros. Meat. & Prov. Co., decided at this term.] Depreciation in the market value of land is the measure of recovery in an action for a permanent nuisance (Smith v. Sedalia, 244 Mo. 107; Kellogg v. Kirksville, 132 Mo. App. 519), but is not the test for, nor even an element in, the assessment of temporary damages.

Plaintiff is entitled to recover the damages that had accrued at the time of the commencement of this action from the three elements of injury we have mentioned, viz., first, the impairment of the means of ingress and egress; second, injury to the comfortable use and enjoyment of the premises, and, third, the destruction of her right to use the street as a temporary place of deposit for fuel and other bulky materials for use and consumption on her premises. In enlarging the scope of her recoverable damages the instruction quoted contains prejudicial error against defendant. This is not an instance of nondirection but of positive misdirection. For this error the judgment is reversed and the cause remanded.

All concur.

THE STATE OF MISSOURI at the Relation of ROY W. RUCKER, Prosecuting Attorney of Chariton County, Missouri, Respondent, v. CHRIS FEITZ, Appellant.

Kansas City Court of Appeals, November 3, 1913.

1. **INJUNCTION, MANDATORY: Equity: Obstructions in Public Highway.** The defendant was indicted and convicted for obstructing a public road. He paid the penalty imposed but did not remove the obstruction and this action was instituted by the prosecuting attorney to enforce its removal. The defendant, the owner of a farm, erected a fence eight or ten feet outside

Digitized by Google

of his property line and on the adjacent public highway. *Held*, that the power and jurisdiction of a court of equity to give speedy and complete relief to the public in such case cannot be successfully questioned.

2. ———: ———: **Public Nuisance.** A prosecuting attorney is authorized by law to prosecute an action in equity in behalf of the State to enjoin a public nuisance, notwithstanding the existence of other civil and criminal remedies.

3. ———: ———: **Criminal Laws.** A court of equity will not undertake to enforce the criminal laws; therefore it will not enjoin the commission of a threatened act merely because the act would be a crime, but, on the other hand, neither will it withhold its equitable relief in a case in which for other reasons it has jurisdiction, merely because the act when committed would be a crime.

Appeal from Chariton Circuit Court.—*Hon. Fred Lamb*, Judge.

AFFIRMED.

S. A. Davis, Jones & Conkling for appellant.

Roy W. Rucker for respondent.

JOHNSON, J.—In 1906, defendant became the owner of a farm on the south side of a public road in Chariton county which had been recognized and used as a public highway for more than sixty years. Originally the road was bounded by rail fences and practically was level, but after years of use by the public the traveled surface, which was near the middle of the right of way, wore off and was washed down, leaving embankments on each side which were not ordinarily used by travelers. In time the rail fences decayed and disappeared, leaving the boundaries of the highway to be defined by hedge fences which the landowners had planted on each side just inside the rail fences. Shortly after he purchased the land defendant built a post and wire fence eight or ten feet north of his hedge fence to mark the north boundary of his

Digitized by Google

farm, thereby encroaching by that space upon the public highway. He was indicted and convicted in the circuit court of Chariton county, on a charge of obstructing a public road and appealed to this court. We affirmed the judgment (State v. Feitz, 154 Mo. App. 578), and in the opinion said:

"There was abundant evidence to show that the public recognized the whole lane, or space between the hedge fences, as the public road, and that it was frequently worked by the public, and that frequently when the main traveled space was very muddy, the side or top of the embankment (or ridge, as called by some of the witnesses) next to defendant's hedge would be used. Considering the whole evidence, it seems to us that the finding of the jury could scarcely have been otherwise than for the State. And if that, in defendant's behalf, were alone considered, it would have sustained a verdict of guilty. Judging by the examination of witnesses and parts of suggestions made in defendant's behalf, he seems to think the State should have been required to prove the whole road space was traveled and worked. That is a condition rarely existing with the country roads. Again, much is said of the 'ridge' lying above the actual traveled space, but that is also a common condition. Much was said in printed and oral argument about whether the road had been dedicated or whether it had become a road by limitation. It is enough to say of this that it is quite certain that it was one or the other, and as either will suffice it is unimportant which it was. We do not agree that there was no evidence of dedication. In the circumstances shown in evidence it may very reasonably be inferred that a dedication was made."

Defendant paid the fine and costs assessed against him but failed and refused to remove the fence which still remains where he placed it. The prosecuting attorney of Chariton county instituted the present pro-

Digitized by Google

ceeding which is an action in equity to obtain a mandatory injunction to compel the removal of the fence on the theory that its maintenance as an obstruction in the highway is a continuing public nuisance. On the final hearing the court decided the issues in favor of plaintiff and rendered judgment in accordance with the prayer of the petition. Defendant appealed. The court made findings of fact in the judgment rendered from which we quote as follows: "That said post and wire fence so erected and maintained as aforesaid by the defendant constitute an obstruction to said public road and highway resulting in a great inconvenience and damage to a large number of the citizens of the State of Missouri, and especially of the citizens of Chariton county, Missouri, who travel along said public road and highway, and that said post and wire fence so erected and maintained by the defendant here, constitutes and is a continuing public nuisance. The court further finds from the evidence that the defendant herein has been prosecuted and convicted in the circuit court of Chariton county, Missouri, under the criminal statutes of the State of Missouri for erecting and maintaining the obstruction herein complained of to the public road and highway hereinbefore described, but that nothwithstanding said prosecution and conviction the defendant has failed and refused and still fails and refuses to remove said obstruction from said public road and highway. The court further finds from the evidence that by reason and in consequence of the said obstruction and nuisance hereinbefore described, so erected and maintained by the defendant the citizens of the State of Missouri and especially of the county of Chariton, who travel along the said public road and highway have sustained and are sustaining great loss and damage and inconvenience, for which they cannot be compensated by suit at law, and for which injury,

Digitized by Google

loss, damage and inconvenience so sustained by them, they have no adequate and complete remedy at law."

There can be no reasonable question of the soundness of our decision of the criminal case that the public highway consisted of the entire strip of land lying between the hedge fences and that the erection and maintenance of the post and wire fence upon that strip constituted an unlawful obstruction of the highway and an interference with the rights of the public. It is a public nuisance, a purpresture that should be abated and the only question we shall discuss and determine is whether or not the aid of equity may properly be invoked for its suppression.

Counsel for defendant rely on the rule that injunction will not lie where an adequate remedy at law exists (High on Injunctions, 745, 761, 829, 830; McWilliams v. Burnes, 115 Mo. App. 12) and insist that a complete and adequate remedy at law does exist for the removal of the obstruction (citing Revised Statutes 1909, sections 10478, 10533 and 11764; High on Injunctions, sec. 823; Kurz v. Turley, 54 Mo. App. 237; State ex rel. v. Buhler, 90 Mo. 568.) Further counsel argue that "courts of equity will not lend their aid in the enforcement of the criminal laws or in restraining acts which are criminal in their nature (citing High on Injunctions, sections 20 and 68; Railway v. Kansas City, 29 Mo. App. 96; State ex rel. v. Schweickardt, 109 Mo. 496).

These are well-recognized and frequently applied rules and it must be conceded that the statutes of this State cited by defendant provide means for the removal of obstructions in public highways and for the punishment of those who willfully or knowingly set up such obstructions. But the existence, of these remedies is not exclusive for the reason that they cannot be held to be complete and adequate in all cases. The facts of the present case pointedly exemplify the in-

Digitized by Google

adequacy of the legal remedies. For a number of years the defendant has maintained a purpresture upon public rights and property in contempt and defiance of the law and of the efforts of its officers to enforce it. A successful criminal prosecution has proved insufficient to overcome his determination and ability to persist in wrongdoing. The power and jurisdiction of a court of equity to give speedy and complete relief to the public in such case cannot be successfully questioned and has been expressly sanctioned in recent decisions of the Supreme Court and of this court. [State ex rel. v. Canty, 207 Mo. 439; State ex rel. v. Lamb, 237 Mo. 437; State v. Franklin, 133 Mo. App. 486; Heitz v. City of St. Louis, 110 Mo. l. c. 626.]

In the case first cited the Supreme Court speaking through WOODSON, J., say: "But the power and jurisdiction of a court of equity to enjoin the maintenance of a public nuisance is of a very ancient origin and is a well-established doctrine.

"Judge STORY, in treating this question, said: 'In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so-called, but also to purprestures upon public rights or property.' [2 Story's Equity Jurisprudence (13 Ed.), sec. 921.] And in section 923 the same author says: 'In cases of public nuisances, properly so-called, an indictment lies to abate them and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction.' And he further says in section 924: 'The ground of this jurisdiction of courts of equity in case of purpresture as well as of public nuisances undoubtedly is their ability to give more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive

Digitized by Google

and vexatious litigation. In the first place, they can interpose where courts of law cannot, to restrain and prevent such nuisances as are threatened or are in progress, as well as to abate those already existing. In the next place, by a perpetual injunction the remedy is made complete through all future time; whereas an information or indictment at the common law can only dispose of the present nuisance, and for future acts new precautions must be brought."

And in State ex rel. v. Lamb, supra, the same court expressly hold that a prosecuting attorney is authorized by law to prosecute an action in equity in behalf of the State to enjoin a public nuisance, notwithstanding the existence of other civil and criminal remedies. "A court of equity (say the court) will not undertake to enforce the criminal law; therefore, it will not enjoin the commission of a threatened act merely because the act would be a crime, but, on the other hand, neither will it withhold its equitable relief in a case in which, for other reasons, it has jurisdiction, merely because the act when committed would be a crime."

No error was committed by the learned trial judge in making the injunction perpetual. The judgment is affirmed. All concur.

LIDA HANLIN and JOHN HANLIN, by Next Friend, Respondents, v. BURK BROTHERS MEAT & PROVISION COMPANY, Appellant.

Kansas City Court of Appeals, November 3, 1913.

1. **DAMAGES: Pollution of Watercourses.** The plaintiffs sued to recover damages for the pollution by the defendant of a natural watercourse that ran over their land. The defendant operated a meat packing plant and emptied into the stream highly offensive and deleterious fluids and substances which caused the stream and an adjacent well to become unfit for use. *Held*, that the plaintiffs were entitled to damages resulting from

Digitized by Google

loss to the rental value of their property to the date of the filing of the suit and from the permanent injury to the well which their evidence tends to show has been completely destroyed by the seepage from the polluted stream.

2. GUARDIAN AD LITEM: Next Friend: Action by Minor: Appearance. The appearance of an infant plaintiff in court without a guardian or next friend does not close the door of the court against him, but imposes a duty on the court to appoint a guardian to represent him. A minor may be brought into court as a defendant by service of process, or he may submit himself to the jurisdiction of the court as a plaintiff, after which, in either case, it becomes the duty of the court to appoint a guardian *ad litem* to represent him.

3. DAMAGES: Permanent and Temporary Nuisance. When a dominant proprietor has set up a nuisance to the injury of his servient neighbor that may be abated or discontinued at any time, it is a temporary injury and not permanent.

Appeal from Adair Circuit Court.—*Hon. Nat M. Shelton,* Judge.

REVERSED AND REMANDED.

C. E. Murrell and *P. J. Rieger* for appellant.

Smoot & Cooley and *J. E. Rieger* for respondents.

JOHNSON, J.—This suit was instituted March 9, 1911, in the circuit court of Adair county by Lida Hanlin and her minor son, John, against the defendant corporation to recover damages resulting from the pollution by defendant of a natural stream flowing across land owned by plaintiffs near the city of Kirksville. A trial of the issues raised by the pleadings resulted in a verdict and judgment for plaintiffs in the sum of $250, and the cause is here on the appeal of defendant.

It appears that John Hanlin who now is of lawful age was only twenty years old at the time the suit was brought and that his attorneys, not knowing of his minority, acted in his behalf as though he were *sui juris,*

Digitized by Google

and joined him as party plaintiff without first procuring the appointment of a next friend to prosecute the action for him. After the petition was filed and the summons was issued and served, the attorneys discovered the error and at the return term and before answer, procured the appointment of the father of the minor plaintiff as his next friend. The father died before the trial and Lida Hanlin, the mother and coplaintiff of the minor, was appointed as his next friend. No amended petition was filed alleging the facts of the minority of John and of the appointment of a next friend to prosecute the action in his behalf. A motion to dismiss the action on the ground that the minor plaintiff "does not have legal capacity to sue, being a minor and under the age of twenty-one years of age and no next friend was appointed for him prior to commencing this action, " was filed by defendant and overruled by the court. Defendant then filed an answer in which it is alleged that "John Hanlin is a minor and as such minor had no legal right to bring this suit prior to the appointment of next friend by the court or clerk in vacation for the purpose of bringing such suit, that no one had been legally appointed to act for such minor in this action and this court is without jurisdiction to hear and determine this cause."

Counsel for defendant argue that since the statute (Sec. 1745, Rev. Stat. 1909) requires that "the petition for the appointment of a next friend, the written consent of the person proposed to be next friend and the order of appointment shall be filed in the office of the clerk of the court where the suit is proposed to be brought, before any proceedings shall be had in the cause," the failure to procure the appointment of a next friend before the filing of the petition constituted a jurisdictional defect fatal to the prosecution of the suit and which could not be cured by a subsequent attempt to comply with the statute.

Digitized by Google

A minor is deemed incapable in law of employing counsel or of prosecuting an action in his own behalf and, therefore, can sue only by next friend or guardian. [Kurtz v. Eisenstein, 123 Mo. App. 288.] If one thus incapable assumes the right to act in his own behalf without the previous appointment of a next friend or guardian, he will not be bound by the proceeding if its result is unfavorable to him but may repudiate it after attaining his majority.

The statute quoted contemplates that a minor, possessed of a cause of action, shall have the benefit of adult agency and judgment before any step is taken in the prosecution of his case and the Supreme Court observed in Holton v. Towner, 81 Mo. l. c. 367, that the appointment of a next friend "can only be made at the time and in the manner pointed out by the statute," and held in Casler v. Chase, 160 Mo. 418, that the petition should allege facts showing compliance with the statute.

But in a number of cases the Supreme Court hold that the appearance of an infant plaintiff in court without a guardian or next friend does not close the door of the court against him but imposes a duty on the court to appoint a guardian to represent him. The court say in Cochran v. Thomas, 131 Mo. l. c. 275: "It appears, therefore, that a minor, as he may be brought into court as a defendant by service of process, so he may submit himself to the jurisdiction of the court as a plaintiff, after which in either case it becomes the duty of the court to appoint a guardian *ad litem* to represent him."

And in Padgett v. Smith, 206 Mo. l. c. 313, it is said: "There is no merit in the contention of want of jurisdiction. The defendant Smith was duly served, appeared, answered and went to trial. Those steps closed the question of jurisdiction as to his person. The jurisdiction of the infant plaintiff is also un-

Digitized by Google

doubted. That jurisdiction did not depend on whether his grandfather was his guardian at the inception of the suit, or whether the court subsequently appointed Mills to act as his guardian for the purposes of the case. The court would have had jurisdiction of the infant if he had appeared by an attorney alone. [Cochran v. Thomas, 131 Mo. l. c. 275; Chrisman v. Divinia, 141 Mo. 122; Jones v. Steele, 36 Mo. 324; Holton v. Towner, 81 Mo. 360.]"

Following these cases we hold that the court acquired jurisdiction over the infant plaintiff and his cause and became charged with the duty on the discovery of his minority of appointing a next friend to represent him. Further we may add that the Statute of Jeofails (Sec. 2119, Rev. Stat. 1909) contemplates that such jurisdiction may be acquired without literal compliance with the statute relating to the appointment of a next friend. The seventh clause provides that no judgment recovered by an infant shall be reversed or impaired because the plaintiff appeared by attorney and not by next friend or guardian.

Since the court had jurisdiction over the minor plaintiff and the cause of action, no error was committed in appointing a next friend to represent him during his minority.

In 1910, defendant built and began operating a meat packing plant on land near that owned by plaintiffs and it is charged in the petition that highly offensive and deleterious fluids and substances were constantly being emptied from the plant into the stream which flows thence across the land of plaintiffs. The evidence of plaintiffs tends to show that the pollution thus cast upon their premises has made the waters of the stream unfit for use, the dwelling house untenantable and has destroyed a well near the bank of the stream. The evidence of defendant is to the effect that the plant is under Government inspection, is op-

Digitized by Google

erated under the most modern scientific and sanitary rules and that no offensive or injurious matter is emptied into the stream. This difference in the evidence was resolved by the jury in favor of plaintiffs and no point is made by defendant that the verdict is not supported by substantial evidence. Defendant does complain, however, of the instruction given at the request of plaintiffs on the measure of damages which is founded on the idea that the damages, if any, sustained by plaintiffs are permanent, and should be measured by the depreciation in the market value of the land caused by the erection and maintenance of a permanent nuisance. As supporting the ruling of the court in giving this instruction, we are cited by counsel for plaintiffs to the cases of Smith v. Sedalia, 182 Mo. l. c. 12; Smith v. Sedalia, 244 Mo. 107; Kellogg v. Kirksville, 132 Mo. App. 519; Kellogg v. Kirksville, 149 Mo. App. 1.

Those were cases where a city constructed a public sewer system in a way to collect and empty sewage into a natural stream to the injury of a servient proprietor. Both the Supreme Court and this court held the damages were permanent on the theory that the sewer was a permanent structure, that its continued use by the city could not be prevented by law and that in legal effect the land of the complaining plaintiff had been appropriated for public use without just compensation. As is said by the Supreme Court in Smith v. Sedalia, 244 Mo. l. c. 122:

"This suit is not grounded upon trespass merely, nor upon nuisance, although the injury takes the form of a nuisance, but upon the constitutional right to compensation for property damaged for public use (Webster v. Railroad, 116 Mo. l. c. 118; Turner v. Railroad, 130 Mo. App. 540); and it is so argued in plaintiff's brief. The city, by proper proceedings to that end, had the right by statute to secure the use of this stream

Digitized by Google

for sewer purposes. The city did not condemn, but appropriated the use. Such action, however, does not deprive the plaintiff of his right to compensation, nor does it affect the measure of damages, which, for such use by the city, whether by condemnation or appropriation, is the diminution in market value of the land damaged. As this court said in McReynolds v. Railroad, 110 Mo. l. c. 488, 'no good reason, founded upon principle, can be assigned why the same rule should not be applied in both classes of cases' (condemnation and appropriation); 'the injury is just the same, the damage is the same, and the compensation should be the same.'

"Both suits brought by plaintiff are, substantially, actions for damages for injury to his land resulting from a wrongful appropriation by the defendant city. He concedes the right of the city to condemn, and complains because it has not done so, insisting in effect that the city shall put him in the position to claim permanent damages; but by his 1895 suit he has put himself in position to claim the same measure of damage in full compensation for the injury."

In the present case a dominant proprietor has set up a nuisance to the injury of his servient neighbor that may be abated or discontinued at any time and, therefore, is of a temporary nature. The rule in such cases is not to measure the damages by the depreciation in the market value of the land, but to allow the plaintiff to recover for loss and damage to the comfortable use or rental value of the premises caused by the temporary nuisance to the time of the commencement of the action, together with such special damages as may be shown by the evidence to have resulted directly therefrom. On the showing made by plaintiffs they were entitled to damages resulting from loss to the rental value of their property to the date of the filing of the suit and from the permanent injury to the

Digitized by Google

well which their evidence tends to show has been completely destroyed by the seepage from the polluted stream.

The judgment is reversed and the cause remanded.

STATE OF MISSOURI at the Relation of WILLIAM A. HELLER, Appellant, v. JOHN G. THORNHILL et al., Respondents.

Kansas City Court of Appeals, November 3, 1913.

1. **DRAMSHOPS: Granting License: Judicial Act.** The power or jurisdiction to grant saloon licenses is vested exclusively in the county court, and, in passing upon an application for a saloon license, the court acts judicially.

2. **———: ———: ———: Two-thirds Petition.** The matter of hearing and passing upon an application for a saloon license is judicial whether the applicant claims to have a majority or a two-thirds majority of the persons in the block qualified to sign. Whether an act is ministerial or judicial depends upon the nature and character of the act and the things necessarily involved therein and not upon the allegation in appellant's petition.

3. **———: Mandamus: To Compel Granting of License.** Where the record shows that the county court entertained relator's petition for a license and, after listening to the evidence, found that relator's petition did not contain a two-thirds majority of the required signers, and, on this account, refused to grant the license, mandamus will not lie. And where the petition for the writ and the alternative writ show on their faces the existence of such finding by the county court adverse to relator, they state no cause of action.

4. **———: ———: Decision of Preliminary Question.** Even upon the theory that such finding is upon a preliminary matter to be determined before the right to act arises, the decision of the county court on such preliminary question of fact, which involves the hearing of evidence and the formation of belief in regard thereto and the reaching of a conclusion thereon both as to fact and law, cannot be reviewed by mandamus because the general nature of the duty to be performed is judicial, and the law intends that such decision shall be final.

Digitized by Google

5. ———: ———: **When Mandamus Will Lie.** It is only when the county court refuses to hear the application, or when it has found in relator's favor every fact necessary to the granting of the license, and yet refuses to issue the license, that mandamus will lie.

Appeal from Nodaway Circuit Court.—*Hon. Wm. C. Ellison,* Judge.

AFFIRMED.

Cook, Cummins & Dawson for appellant.

Ellis G. Cook for respondents.

TRIMBLE, J.—Relator applied to the circuit court of Nodaway county for a writ of mandamus to compel the county court to grant him a license to keep a dramshop in Maryville, a city of more than 2000 inhabitants. Upon the issuance and service of the alternative writ, the judges of the county court, as respondents thereto, moved to quash the petition and writ. This motion was sustained and relator appealed.

The reasons stated in the motion to quash are, first, that the facts pleaded in the petition and stated in the alternative writ are not sufficient to give the circuit court jurisdiction over the acts of the county court complained of; second, that the petition and writ fail to state facts sufficient to constitute a cause of action.

An examination of relator's petition for the writ, and also the alternative writ itself, discloses that on their faces they show that, in the proceeding before the county court to obtain a license, that court, in passing upon the sufficiency of relator's petition for a license, heard the evidence and found and adjudged that said petition did *not* contain a two-thirds majority of the persons qualified by law to sign the same. While relator's petition for mandamus says that his petition

Digitized by Google

for license did contain a two-thirds majority, yet it also says that the county court heard his case, and, after finding that relator had otherwise qualified himself, *found against him* on the question of whether his petition contained a two-thirds majority, and thereupon refused to grant the license. The case, therefore, is not one where the county court has refused to hear or act upon relator's application, nor is it one in which the county court has found all the necessary questions in relator's favor and yet refuses to issue the license. It is one where the relator pleads that, in his opinion, he had a two-thirds majority petition before the county court, but that said tribunal, "after listening to all the evidence" had found and adjudged that he did *not* have, wherefore, he asks the circuit court to hear the case anew and peremptorily command the county court to grant him a saloon license. This raises the question whether the judgment of the county court, finding that the petition did not contain the required number of signers and refusing the license because of such insufficiency, can be reviewed, or a new trial thereof be had, by mandamus, in the circuit court.

It is conceded that mandamus will not lie to control or review the action of any court where the act complained of is judicial. If, therefore, in hearing and passing upon the matters involved in the determination of the question of relator's right to a saloon license, the county court acts in a purely ministerial capacity, then mandamus can be invoked herein. But if the county court in such matters acts judicially, the writ will not lie.

Our courts have always held that in passing upon an application for a saloon license, the county court acts judicially. [Burkharth v. Stevens, 117 Mo. App. 425; State ex rel. v. Higgins, 84 Mo. App. 531; State ex rel. v. Heege, 37 Mo. App. 338; Cooper v. Hunt, 103 Mo. App. 9.] It has been held heretofore also

Digitized by Google

that the jurisdiction to grant saloon licenses was vested exclusively in the county court. [State v. Evans, 83 Mo. 319; Austin v. State, 10 Mo. 591; State ex rel. v. Fort, 107 Mo. App. 328; Burkharth v. Stevens, 117 Mo. App. 425; State ex rel. v. Higgins, 84 Mo. App. 531.] This being true, it would seem that mandamus would not lie.

It is urged, however, in behalf of relator that since section 7191, Revised Statutes of Missouri 1909, leaves it *discretionary* with the county court whether the license shall be granted or not if the petition contains *only a majority* of the persons qualified to sign, but makes it *mandatory* where the petition is signed by a *two-thirds majority,* this makes the matter of hearing and passing upon an application for a saloon license, where the applicant *claims* to have a two-thirds majority, a mere ministerial act, and consequently the above decisions do not apply to this case and mandamus will lie. It seems to the writer, however, that whether a certain act is ministerial or judicial depends upon the nature and character of the act itself and upon the things necessarily involved therein, rather than upon what the applicant may claim in his petition for the act. An act cannot be said to be ministerial when it rests upon or is called into existence by the exercise of judgment upon matters of fact. [Teat v. McGaughey, 22 S. W. 302.] Where the duty is such as necessarily requires the examination of evidence and the decision of questions of law and fact, such a duty is not ministerial, and not being ministerial the decision of a public officer to whom the discharge of such duty has been confided cannot be reviewed or reversed in a mandamus proceeding. [Henkel v. Millard, 97 Md. 24, l. c. 31; Duvall v. Swann, 94 Md. 608, l. c. 617-18.] Even in cases where, without the aid of mandamus, there would be a failure of justice, the writ will lie to enforce the performance of

Digitized by Google

a *strictly ministerial duty only;* and by a strictly ministerial duty is meant one that is absolute and imperative requiring *neither* the exercise of official discretion *nor* judgment. [Wailes v. Smith, 76 Md. 469, l. c. 477.] The general rule is that where a subordinate body is vested with power to determine a question of fact the duty is judicial and though it can be compelled by mandamus to investigate the fact it cannot be directed to decide in a particular way, however clearly it may be made to appear what the decision ought to be. [Abrams v. Hempstead, 45 Hun. 272.] Mandamus will not be granted to compel the performance of an act in a case where numerous questions of law and fact arise, some of them depending upon circumstances which rest in parol proof. [U. S. v. Commissioner, 5 Wall. 563.] Of course under section 7191, Revised Statutes of Missouri 1909, in cities of 2000 inhabitants or more, the county court must grant a license when the the applicant has shown himself qualified therefor, but one of these preliminary requirements and qualifications is that he have a petition signed by a two-thirds majority of the persons in the block who are qualified to sign. But this mandatory duty does not arise until all of these preliminary questions have been decided in the applicant's favor. The statute says *if* the county court shall be of the opinion that the applicant is a law-abiding assessed tax-paying male citizen, and *if* the petition contains a two-thirds majority, etc., *then* the court shall grant the license. And so in all the cases cited, where mandamus was used to compel the county court to act, the county court had found all these preliminary matters *in the relator's favor.* [Beans v. County Court, 33 Mo. App. 635; State ex rel. v. McCammon, 111 Mo. App. 626; Scarritt v. Jackson County, 89 Mo. App. 585; State ex rel. v. Packett, 136 Mo. App. 700; State ex rel. v. Turner, 210 Mo. 77.] The writer has been unable to

Digitized by Google

find a decision where mandamus was used to compel the county court to act in a case where one of these preliminary questions, resting upon matters of fact requiring the hearing of evidence and the reaching of a conclusion based thereon, had been decided by the county court *adversely* to the relator.

It is true that the decisions in the various States are conflicting upon the question whether mandamus will lie in a case where the duty to act is made mandatory upon an inferior tribunal upon the existence of certain facts being shown. Some of the cases hold that even if the determination of the preliminary questions, upon which the necessity of action rests, does involve the exercise of judgment and discretion, still mandamus will lie. Others, however, hold to the contrary. And in summing up the decisions on this question, Merrill on Mandamus, sec. 48, says: "The weight of authority seems to be that erroneous decisions as to preliminary questions of *law* may be reviewed by the writ; that erroneous decisions as to preliminary questions of *fact* may be reviewed, *unless the general nature of the duties to be performed* are *considered to be judicial, or the law intended that such decision should be final.*" It would seem that, under our laws relating to the granting of dramshop licenses, not only is the general nature of such act considered judicial, but that, as the jurisdiction to grant such licenses is confided exclusively to the county court, the law intended that court's decision should be final. And such has been the general understanding of the Missouri bench and bar, as in every case wherein mandamus was sought to obtain a saloon license, it was always thought necessary that the record of the county court should affirmatively find every preliminary fact in the applicant's favor. Nowhere in the law is there any provision authorizing the circuit court to pass upon the sufficiency of an application for a dramshop license.

Digitized by Google

If the circuit court in a mandamus case can hear the evidence and decide the questions involved in the granting of a saloon license and order the county court to issue the license, then it is the circuit court, and not the county court, that is granting it. A writ of mandamus cannot be made to take the place of a new trial or writ of error. [State ex rel. v. Flad, 108 Mo. 614; State ex rel. v. Gibson, 184 Mo. 490, l. c. 507.]

The theory underlying the contention that mandamus will lie under the circumstances shown in this case is that the determination of the question whether or not the petition is signed by two-thirds of the persons qualified to sign is a mere ministerial act. But what does the decision of this question involve? It involves much more than the mere inspection of the names on the petition and the comparing of them with those on the last previous annual assessment list and poll of the vote in the city. It involves the delicate questions of residence and citizenship which require the taking of testimony, the investigation of many facts and the forming thereon of conclusions both of fact and law, and about which even experts and learned men differ. A decision on such question involves not only the county court's *belief* of the testimony offered, but of other things. Can the circuit court, by mandamus, compel the county court's *belief* as to matters of fact? If mandamus will lie, the circuit court must either do that or hear the evidence and form its own belief. This would be to try the case *de novo* as on appeal, and mandamus cannot be used to perform that office. Relator prays that the court order the county court to issue him a license. The court, however, could in no event do that until after it had *tried the case* and determined that relator was entitled to a license. Suppose, however, the circuit court should hear the evidence and decide that

Digitized by Google

relator did not have the required petition, and relator should be of the opinion that he had made a prima facie case and that respondent's (or the remonstrators') evidence was demurrable, could he not appeal to this court? And if so, would we not be called upon to say whether or not we, and not the county court, would grant the license? And if mandamus in such case lies then it would be this court granting a license, a novel idea in our jurisprudence.

But aside from all this, the general nature of the granting of saloon licenses is judicial in character, and hence the county court's action is not reviewable unless every fact necessary to the granting of the license has been eliminated from the case by a finding of the county court in relator's favor. In State ex rel. v. Fitzpatrick, 80 Mo. 601, the Supreme Court, before affirming a judgment in which the peremptory writ was ordered to issue, took pains to say that the county court was required to ascertain and determine whether the petition was signed by two-thirds of the qualified petitioners in the block, and that *as* the county court *had found this fact,* such order eliminated from the case every fact necessary to be passed upon by the county court. Thus showing that it was only when all elements of fact bearing upon the question of relator's right to a license have been resolved in relator's favor that a writ of mandamus could issue. In State ex inf. v. Fleming, 147 Mo. 1, it was held that the determination by the county court that a majority of the taxable inhabitants of a town had signed a petition for incorporation was a judicial and not a ministerial act. In that case the statute was mandatory on the county court "whenever" a petition signed by a majority was presented. The answer set up that the court had found that the petition was so signed. The reply admitted that the court had so found, but declared that as a matter of fact it was not so signed.

Digitized by Google

The court, on page 10, in speaking of the finding of the county court in this regard, say: "There can be no doubt that under either of these definitions the action of the county court was to all intents and purposes a judgment. It determined a compound question of both law and fact: First, as to number of inhabitants within the boundaries of the specified district; second, a question of law, whether a majority of the 'taxable inhabitants' of such district were the signers of the presented petition. Precisely this view, in effect, was taken by this court in State v. Evans, 83 Mo. 319, wherein it was ruled that the decision by a county court, on presentation of a petition for a dramshop license under a law which required the applicant for license to be a person of "good character," and that the petition was 'signed by a majority of the taxpaying citizens,' etc., that these necessary facts existed, was a judgment impregnable to collateral attack, whatever might have been the actual facts in the case. . . . It seems to me that all of the qualities and incidents which inhere in the action of the county court on presentation of a petition for dramshop license, and make that action judicial, and immune from collateral attack, equally inhere in similar action of the county court on presentation of a petition for incorporation of a city." It is true the court in that case appointed a commissioner to take evidence but it was solely on the ground that *quo warranto* was a direct attack by the State upon the proceeding under which even a judgment can be set aside. But the inference is clear in both the Fleming and Evans cases, that where the circuit court has no authority to inquire into the correctness of the county court's judgment as to whether a majority had signed the petition presented to it, certainly there is no authority for the circuit court to inquire into the county court's judgment that a two-thirds majority had *not* signed.

Digitized by Google

In State ex rel. v. Russell, 131 Mo. App. 638, it is held that a board of Aldermen in cities of the Fourth class, in passing upon the sufficiency of a petition for a dramshop license, acts judicially, and its order cannot be attacked collaterally by inquiring into the evidence upon which the sufficiency of the petition was determined. In that case the contention was that the board had found erroneously there were sufficient signers to the petition (which is the converse of the proposition urged by relator here). The court, however, speaking through Judge GOODE, say: "To uphold this contention without an averment of fraud in the conduct of the board, we must be prepared to say the truth of a judicial finding may be called in question collaterally; and this, of course, we will decline to say. If judicial proceedings could be thus collaterally challenged and annulled, every order of a county court or city council for license, and every finding of fact on which the order was based, could be reopened and the facts lying back of the record again examined. The law does not accept such a doctrine; but having lodged the power to find the facts in a body or tribunal which acts judicially, assumes its findings are true. [State v. Evans, 83 Mo. 319, 322; State v. Cauthorn, 40 Mo. App. 74, 99; State v. County Court, 45 Mo. App. 394; Cooper v. Hunt, 103 Mo. App. 9, 77 S. W. 403, and cases cited.] Respondent's refusal would stand on a very different footing if fraud was shown on the part of the board, especially in an equity suit. It might well be that such a finding, like any other judgment induced by fraud practiced in procuring it, would be vacated. This was held in a recent case where it was shown a county court fraudulently found the requisite number of petitioners had asked the granting of a dramshop license, and had refused to make proper entries of record so as to enable the remonstrators to contest the matter by *certiorari*. [Burkharth v. Stephens, 117

Digitized by Google

Mo. App. 425, 94 S. W. 720.] . . . To permit an inquiry into the evidence used by the board with a view to annulling its findings, if the evidence was incompetent, would be but a roundabout way of allowing a collateral attack on the action of a tribunal in a proceeding which it was empowered to adjudicate."

In Kochitzky v. Herbst, 160 Mo. App. 443, it was held that the county court acts judicially in determining whether a petition for a dramshop is properly signed, and its judgment is conclusive except in a direct proceeding to set it aside for intentional wrong or fraud.

In order that it may clearly appear that the county court did not arbitrarily record as a mere conclusion a finding that relator's petition was not signed by a two-thirds majority, but that it reached such conclusion carefully and as relator states "after listening to all the evidence" the order made by the county court, as pleaded by relator in his petition for the writ and as set forth in the alternative writ, is here set forth:

"The court further finds that the said application and petition contains the following named persons who are assessed tax-paying citizens of the city of Maryville, Mo., as shown by the last previous annual assessment and vote of the city, as aforesaid, and own property located in said block as aforesaid, and are therefore proper signers to the said application and petition: C. B. Yoe, A. Lippman, C. J. Green, Joe Binter, C. W. Seiler, S. R. Lucas, Fred Smith, R. Kuchs, A. Kuchs, Theodore Blatter, W. J. Staples, and W. A. Heller.

"The court further finds that there are subscribed to the said application and petition the following named persons who are not assessed tax-paying citizens of the city of Maryville, Missouri, as shown by the last previous annual assessment and vote of the city, as aforesaid, owning property located in the block aforesaid, and are therefore not qualified signers to the said ap-

Digitized by Google

plication and petition: Dell Davison, Conrad Sweitzer, John P. Behm, Paul Kuchs, L. G. Upschulte, Charles Buhler, Chas. M. Heflin, L. S. Yoe, John Kirch, and Grant Trusty.

"The court further finds that there are the following named persons who are assessed tax-paying citizens of the city of Maryville, Missouri, as shown by the last previous annual assessment and vote as aforesaid, who own property located in the block aforesaid; and who did not sign the application and petition: John Airy, John K. Sawyers, E. Airy, Hal Hooker, George S. Miller, Ed Otis, Charles Stilwell, Geo. L. Wilfrey, S. H. Kemp, Fin Conrad, Omar Catterson, and S. G. Gillam.

"The court therefore finds that the said application and petition does not contain a two-thirds majority of all the assessed tax-paying citizens of the city of Maryville, as shown by the last previous annual assessment and vote, as aforesaid, who own property located in the block, as aforesaid.

"It is therefore ordered and adjudged by this court that the said application and petition be rejected and that a license for a dramshop as prayed for in the said application of William A. Heller, be and the same is hereby denied."

Relator then pleads that certain of the names, whom the county court found were not proper signers, were such and should have been counted; and also pleads that certain of the persons whom the county court found were qualified to sign but had not, were not in fact and truth qualified to sign, and, therefore, should not have been taken into consideration in determining whether the petition was signed by a two-thirds majority. So that clearly relator, by his petition for mandamus, is asking the court to again hear the evidence and decide the questions of law and fact which were presented to and passed upon by the county

Digitized by Google

court. In State v. Evans, 83 Mo. 319, l. c. 321, the Supreme Court said: "Exclusive jurisdiction on the subject of issuing licenses for the sale of liquor has been conferred upon the county court." And then on page 322, after quoting the statute relating to the granting of saloon licenses, said:

"It thus seems that the exclusive power of granting licenses for the sale of liquor is vested in our county courts, and that in the exercise of such power they act in obedience to their opinion and judgment, It is for them to say whether or not the applicant is a person of good character, and whether or not the preliminary petition, required by law, has been signed by a majority of the tax-paying citizens of the city and square wherein the dramshop is to be located."

As exclusive jurisdiction is in the county court, and the entire matter of determining whether a saloon license shall be granted is judicial in character, requiring the hearing of testimony *pro* and *con,* the formation of belief thereof and the reaching of a conclusion thereon, it would seem that the circuit court was right in dismissing the petition for the writ.

It has been asked, if this be the law, what remedy has a petitioner for a saloon license in a case where he did in fact and in law have a two-thirds petition, and yet the county court refused to grant him a license. To this the answer may be first, that, if the decision of the county court in passing upon a dramshop license is a *judgment,* then certainly the petitioner has no remedy by mandamus. As to what other remedy he may have it is also certain that he has the same remedies open to him to attack such judgment as are allowed against any other judgment rendered by a court having exclusive jurisdiction and from which there is no appeal or writ of error. If there be fraud, corruption, or intentional wrongdoing, or arbitrary ruling amounting in law to such, then a bill in equity could be

Digitized by Google

entertained to set the judgment aside. [Kochitzky v. Herbst, 160 Mo. App. 443; Burkharth v. Stevens, 117 Mo. App. 425; Cooper v. Hunt, 103 Mo. App. 9.] It cannot, however, be annulled, overturned, set aside, or supplanted by a proceeding in mandamus, and that is the question here. The judgment of the court sustaining the demurrer and dismissing relator's petition and alternative writ is, therefore, affirmed. *Ellison, P. J.*, concurs. *Johnson, J.*, dissents.

W. H. YONTZ, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, November 17, 1913.

1. **CARRIERS OF GOODS: Burden of Proof.** A railway carrier of grain who receives it for shipment is obliged to deliver it at destination; and if it be lost or injured the burden is on him to excuse himself by showing that it occurred in some way for which he is not liable. The presumption is in favor of the shipper and a receipt and failure to deliver in as good condition as received, makes a prima facie case for him.

2. **———: Pleading: Specific Negligence: Onus: Presumption.** If the petition, of a shipper in an action for damages to corn on its arrival at destination, alleges the specific negligence which caused the damage, the burden is on him to prove the damages alleged, since, as he knows the cause, no presumption arises in his favor. Presumptions do not exist where the facts to be presumed are shown.

Appeal from Moniteau Circuit Court.—*Hon. J. G. Slate*, Judge.

REVERSED AND REMANDED.

C. D. Corum and *Roy D. Williams* for appellant.

R. M. Embry for respondent.

Digitized by Google

ELLISON, P. J.—Plaintiff shipped over defendant's road a car load of corn of No. 2 grade from Omaha, Nebraska, to Speed, Missouri. It arrived at the latter point in an injured and damaged condition and was graded No. 3, which resulted in a loss for which he recovered judgment in the circuit court.

Plaintiff chose to plead two specific acts of negligence which he charges damaged the corn and reduced its marketable grade. No contract was pleaded. The first was that defendant negligently placed the corn in "a broken and defective car" at Omaha. The second was that in transferring at Kansas City, from the original car to another, defendant negligently permitted it to be exposed and carelessly handled it so that it became mixed with dirt, damaged and unsalable.

Ordinarily when inanimate merchandise is shipped with a carrier in a good condition and it arrives at destination for delivery in a damaged condition it is for the carrier to account for the condition in some way that will excuse him from his obligation to safely deliver. [Potts v. W. St. L. & P. Ry. Co., 17 Mo. App. 394; Buddy v. W. St. L. & P. Ry. Co., 20 Mo. App. 206; Merritt Creamery Co v. Railroad, 128 Mo. App. 420.] And the shippers case is made prima facie, if he shows good condition when delivered at point of shipment and bad condition when received at destination and the onus is on the carrier to excuse himself. [Read v. Railway Co., 60 Mo. 199; Witting v. Ry. Co., 101 Mo. 631.]

But if the complaining party chooses to specify the negligences he puts aside the presumption in his favor and assumes the burden of proving his specification. The rule making a prima facie case for the shipper when he shows injury or nondelivery and putting the burden on the defendant to relieve himself has arisen from necessity and natural justice. [Hill

Digitized by Google

v. Sturgeon, 28 Mo. 323.] If the carrier receives and fails to deliver at destination or delivers in an injured condition, he knows the cause and the shipper ordinarily has no means of knowing it, and for that reason the presumption has arisen in favor of the shipper which in the absence of legal explanation or contractual excuse entitles him to judgment for damages. But if the shipper alleges that he knows the particular cause and alleges it, he does not need the aid of a presumption and he must therefore prove his allegations as in other cases. Such is the rule in the instance of injured passengers. [Newlin v. Railway Co., 222 Mo. 375; Orcutt v. Building Co., 201 Mo. 424; McGrath v. Railway Co., 197 Mo. 105; Price v. Ry. Co., 72 Mo. 414.] This is illustrated in matter of fact; the presumption of due care is only indulged in the absence of evidence of such care. [Tetwiler v. Railroad, 242 Mo. l. c. 194.]

And we can see no reason why it should not apply as against carriers of freight. The two (persons and property) are spoken of as governed by the same rule in Hill v. Sturgeon, supra; and we considered them as alike in Sachner Bros. v. Express Co., 72 Mo. App. 13. There is no reason for allowing the presumption in one that does not apply in the other.

Plaintiff seems to have tried his case as though he had not pleaded the specific negligence which caused his loss. His evidence and instructions are of that indefinite nature as to show that he is relying on the presumption of which we have spoken. His brief indicates such is his reliance. His instruction is not drawn with reference to the specifications in his petition. It is true he does submit the hypothesis "that the car in which defendant started the shipment was defective and because of such defect defendant was obliged to and did transfer said corn to another car through an elevator at Kansas

Digitized by Google

City," but it nowhere submits whether either the defective car, or the transfer through the elevator, or both, caused the corn to become foul, dirty, and damaged. It directs damages to be allowed if the corn was in bad condition when it arrived at destination. Suppose the car was so defective that it could not be hauled to destination and the corn had been unloaded and put through an elevator at Kansas City, the jury must believe that these things did the damage, and so, upon proper evidence connecting these things with the damage, it should be submitted to a jury. The judgment is reversed and the cause remanded. All concur.

AMERICAN CLAY MACHINERY COMPANY, Respondent, v. THE SEDALIA BRICK & TILE COMPANY, Appellant.

Kansas City Court of Appeals, November 17, 1913.

1. **REPLEVIN: Personal Property Affixed to Realty: Agreement That It Shall Remain Personal Property Until Paid for.** In a written contract creating a conditional sale of machinery executed by the vendor and the owner of land before the machinery was affixed to the realty, it was expressly stipulated that the machinery should remain personal property until paid for and should not become real estate by reason of being in any manner affixed to the real estate, and that vendor should have the right to remove same if not paid for, it was held that, as between the parties to such contract and subsequent purchasers with notice thereof, or whose rights are expressly subject to such agreement, effect will be given to such agreement and the machinery will remain personal property and be removable by the vendor if not paid for, in the absence of a statute forbidding such agreements. And replevin will lie for such machinery after default in the payment of the purchase price or deferred payments.

2. ———: ———: ———. Where, in a written contract made in reference to personal property before it is attached to real estate, it is expressly stipulated that it shall remain personal

Digitized by Google

property and shall not be considered real estate by reason of being attached to land in any manner, such stipulation will be given effect and there is no limitation upon the right of the parties to make such an agreement, as between themselves and subsequent purchasers with notice, unless the property is, in its essential nature, such that it loses its identity by being incorporated into the realty and its removal would result in its destruction.

3. **PLEADING: Petition: Amendments.** Although a petition states no cause of action, yet if defendant does not demur but answers thereto as if it did state a cause, this saves the petition from being considered such a nonentity as to be incapable of being amended. And if plaintiff obtains leave to, and does, file an amended petition, defendant, by filing answer thereto and going to trial thereon, waives any error, if any, in permitting an amendment.

4. ———: ———. Unnecessary allegations in a petition may be treated as surplusage if they do not change, narrow, contradict or limit the issues upon which recovery is sought.

5. **CONDITIONAL SALES: Recording: Subsequent Purchasers with Notice.** A contract which is a conditional sale and not a chattel mortgage does not have to be recorded in order to be valid as to subsequent purchasers with actual notice.

Appeal from Pettis Circuit Court.—*Hon. H. B. Shain,* Judge.

AFFIRMED.

G. W. Barnett for appellant.

Brown, Cell & Myers for respondent.

TRIMBLE, J.—This is an action of replevin brought by the American Clay Machinery Company to recover possession of certain machinery used in the grinding and drying of clay and thereafter in manufacturing it into brick and other clay products. The machinery in question was sold to the Sedalia Clay Manufacturing Company by written contracts. In each there was a clause providing that said machinery was to remain the property of plaintiff until paid for in

Digitized by Google

full, and that its installation in any building should in no sense be construed as making it real estate, or as causing it to form part of the building, while any deferred payments remained unpaid, and that it should retain its personal character, and not become a fixture by being placed in any building or in any manner annexed to any land, and might be taken and removed upon default in making the deferred payments.

The purchaser owned a tract of land adapted to the manufacture of brick and other clay products, and the machinery so purchased was placed thereon for use in such manufacture. The machinery, or at least a certain part of it, was very large and heavy requiring it to be attached very solidly and firmly to the real estate, being set on solid concrete foundations several feet in the ground, and attached to the building by iron beams embedded in the walls, and there were a number of underground trenches or tunnels, lined and covered with concrete, leading from the outside under the walls of the building to the machinery. In fact, it was necessary to first set the machinery in place and then erect the building around it, as the machinery was too large to be taken through doors or windows. The machinery was set up by the purchaser according to specifications furnished by the seller. So that, without going extensively into the evidence, it may be safely said the machinery was very firmly attached to the real estate and could not be taken away without opening a hole in the wall of the building in which it was housed and breaking up, with heavy sledge hammers, the concrete on which the machinery was set and to which it was fastened.

After the machinery was purchased and had been thus installed, the purchaser executed a deed of trust upon all its plant and ground, in which was included the machinery so purchased from the plaintiff company. But said machinery was conveyed "subject to

Digitized by Google

the encumbrance due said company." This deed was afterwards foreclosed, and the property was bought in at foreclosure sale by H. K. Bente who was president of the Sedalia Clay Manufacturing Company, the corporation that purchased said machinery from plaintiff. The trustee's deed, in conveying the plant to Bente, also conveyed the machinery in question subject to the encumbrance thereon due the plaintiff company.

Bente ran the plant awhile and then organized the defendant corporation, of which he is, or was, the president, and to which he deeded the plant; and in this deed the machinery in question was again conveyed subject to the encumbrance due the plaintiff company.

The deferred payments not being paid, either by the original purchaser of the machinery or by Bente or the present corporation defendant, demand was repeatedly made therefor, and, failing to obtain payment, plaintiff instituted this replevin suit and took possession of the machinery. In doing so, it was doubtless necessary to break up the concrete in which the supports of the machinery were embedded, and an opening had to be made in the walls of the building inclosing it, which was afterwards closed up by plaintiff, and the irons by which the machinery was attached to the walls were cut off by means of the cold chisel.

At the close of the testimony each side prayed the court to give the jury a peremptory instruction to find in its favor. The court granted the peremptory instruction prayed by plaintiff, and the jury returned a verdict awarding the property to plaintiff with one cent damages. Defendant appealed.

It is urged that the appeal must be dismissed for the reason that the record does not show that an affidavit for appeal was filed and that an order was made allowing the appeal. Since January 6, 1913, our rule 26 has provided that an appellant need not abstract

Digitized by Google

the record entries showing the steps taken below to perfect an appeal, but that, if the abstract states that the appeal was duly taken, then, in the absence of a record showing to the contrary, it will be presumed the proper steps were taken at the proper time and term. The abstract in this case does not use the expression "the appeal was duly taken" but it does contain the legal equivalent of that statement and is, therefore, sufficient to bring the abstract within the spirit and purpose of the aforesaid rule which is to simplify, as far as lies within the court's unaided power, the process of perfecting an appeal. It is suggested, however, that the statement "the appeal was duly taken" in the exact words of the rule is much more compact and comprehensive than any other which can be used to express that fact. In using the above concise phrase, appellants will run no risk of having their abstracts held insufficient, and the appellate court will not be required to pass on the sufficiency of such abstracts in this respect.

The original petition and also the first amended petition contained no description of the property sought to be replevied, but alleged it was certain articles more fully "described in a certain invoice hereto attached, marked Exhibit 'A' and made a part hereof." An exhibit is no part of the petition even though it is attached thereto and the petition says it is a part of it. [Curray v. Lacky, 35 Mo. 389; Bohling v. McFarland, 38 Mo. 465; Robinson v. Levy, 217 Mo. 498, l. c. 510.] Consequently neither the petition nor the first amended petition described any property. Hence they were open to demurrer. The defendant, however, did not demur, but answered the second amended petition denying that plaintiff was "the owner of or entitled to the possession of the property mentioned in said petition." And after a jury was empaneled and the trial commenced, defendant objected

Digitized by Google

to the introduction of any evidence. Thereupon plaintiff obtained leave to, and did, file a second amended petition over the objections and exceptions of defendant. The latter then refiled its answer to the second amended petition and went to trial. The point is made that neither the original nor first amended petition stated any cause of action at all, and hence they were not amendable. But, as defendant recognized the second amended petition as describing property and as stating a cause of action by filing an answer and going to trial thereon, this was a recognition of the fact that the petition described some property and stated some sort of a cause of action sufficient, at least, to permit an amendment. It has been held that, even in a case where the petition failed so utterly to state a cause of action as to be grounds for arresting a judgment obtained thereon, it could be aided by the filing of an answer. [Donaldson v. Butler Co., 98 Mo. 163; Dillard v. McClure, 64 Mo. App. 488, l. c. 491.] The first amended petition, therefore, could not be regarded as no petition at all, and, by answering to the second amended petition, defendant waived any error there may have been in allowing the last amendment. [Carter v. Baldwin, 107 Mo. App. 217.]

For the same reasons the first amended petition was not incapable of being amended because of the claim that it failed to state that defendant is in possession of the property, or that it unlawfully detains the same, or that plaintiff is the owner and entitled to the possession thereof. So far as the last two necessary allegations are concerned, the said petition does contain them, and as to the first two, it inferentially makes them by alleging facts from which they arise. We do not say that said petition was sufficient, but only that it was not such an absolute nonentity as to be incapable of amendment under the circumstances

Digitized by Google

hereinabove set out and in view of the liberality with which amendments should be allowed.

The objection to the sufficiency of the second amended petition, on which the case was tried, is likewise untenable. It does allege that the plaintiff is the owner of and entitled to the possession of the property. It was not necessary, perhaps, to set out a large part of what is stated in the petition. [First National Bank v. Ragsdale, 158 Mo. 668.] But the fact that it does state them, and then, in a separate and concluding paragraph, says "by reason of the premises considered" it is the owner of said machinery and materials and is lawfully entitled to the possession thereof, does not prevent such allegation from being an unqualified assertion of ownership and right to possession. The statement of facts contained in the petition did not destroy it, but such statement could be treated as surplusage unless the issues upon which recovery was had were broader or different from those limited and made specific by the facts alleged. [Kansas City, etc., Co. v. McDonald, 118 Mo. App. 471.] They did not narrow or limit the issues in this case. In fact it may have been well enough to allege, as it did, the agreement in the contracts of purchase that the machinery should remain personal property the title to which should stay in plaintiff till paid for, and that defendant took said property with full notice of such agreement.

The contracts by which the machinery was purchased were conditional sales and not chattel mortgages. [R. S. Mo. 1909, sec. 2889; Washburn v. Inter-Mountain Mining Co., 56 Ore. 578; 24 Ann. Cases, 357, and cases cited in note on page 361.] Not being chattel mortgages, they did not have to be recorded in order to be valid as to subsequent purchasers with actual notice of them. Such conditional sales are good as between the parties and subsequent purchasers hav-

Digitized by Google

ing notice thereof. [Sec. 2889, R. S. Mo. 1909; Gilbert Book Company v. Sheridan, 114 Mo. App. 332; Kingsland v. Drum, 80 Mo. 646; Oyler v. Renfro, 86 Mo. App. 321, l. c. 325; Young v. Evans-Snyder-Buell Com. Co., 158 Mo. 395, l. c. 410.]

To reach a correct conclusion in this case, we must bear constantly in mind three things. First, the sales of the machinery to the original purchaser were conditional sales. Second, the defendant herein is a subsequent purchaser *with actual notice of the agreement that the machinery should remain personal property and be removed if it was not paid for.* In fact, by obtaining the machinery "subject to" plaintiff's rights defendant took it *in recognition of,* and not in opposition to, the condition in the selling contracts. [Young v. Evans, supra; Mead v. Maberry, 62 Mo. App. 557.] Third, that the agreement between the buyer and seller that the machinery sold, by reason of its installation in any building, "should in no sense be construed as real estate, or as forming part of the building while any deferred payments remained unpaid and that it should retain its personal character, and not become a fixture by being placed in any building or in any manner annexed to any land, and may be taken and removed, if not paid for" is a positive and emphatic declaration, as strong as language can make it, that said property shall *remain personal property and be removable.*

It is not necessary, therefore, to consider the facts and circumstances attending the sale, or the manner of attaching the property to the realty, or the results flowing from its removal therefrom, in order to get at the intention of the parties. That intention is clearly, emphatically and unmistakably expressed in this case. The machinery was to remain personal property and be removable until paid for. In determining whether or not machinery attached to realty remained personal

Digitized by Google

property or became realty, the intention of the owner is the *best test,* and if that is not expressly stated, the adaptability of the machinery to the uses and purposes to be subserved is the next best test. [Prog. Brick Co. v. Gratiot Brick Co., 151 Mo. 501.] In other words, it is for the purpose of arriving at the intention of the owner, that any of the circumstances are looked to for the purpose of determining whether or not machinery becomes a part of the realty. But, if the intention of the owner is the best test, and that intention is explicitly stated, what need is there of looking at the surrounding circumstances? Now, inasmuch as the defendant had actual notice of this and took the property subject to that express agreement, the case before us is precisely as if it were between the plaintiff and the original purchaser. This being so, what is to prevent the machinery from remaining personalty even though it is firmly fixed to the real estate and even though its removal may do some injury to the real estate? Even if this is the case, the party owning the real estate agreed to it in writing. There is no statute forbidding such an agreement, and, in the absence thereof, a person may contract in reference to his realty as he will, provided he does nothing against public policy or violates the rights of others in so doing. In Jones on Chattel Mortgages (5 Ed.), sec. 123, it is said: "Many things ordinarily considered fixtures to the realty may become to all intents and purposes personal property, by agreement of all persons interested in both the realty and fixtures." It is true in the same section it is said there is a limitation upon the rights of parties to change the status of property by agreement; but it will be noticed that this has reference to cases where the *essential character* of the property itself is attempted to be changed, as for instance, the bricks or joists after they have lost their individual identity and have gone into the construction

Digitized by Google

of a house. Our Supreme Court has held that a house erected by one upon the land of another under an agreement that the house shall remain personalty and be removable continues to be personal property, as between the builder and the owner or any one claiming under him with notice, and can be removed by the owner. [Goodman v. Railroad, 45 Mo. 33; Priestly v. Johnson, 62 Mo. 632; Pile v. Holloway, 129 Mo. App. 593.] In Washburn v. Inter-Mountain Mining Co., supra (found also in 109 Pac. 382) it was held that a building and stamp mill, although permanently affixed to the real estate, remained personal property as between the seller and the buyer and also as to subsequent purchasers who have notice of the agreement. And it was also said that, "the strict rule that whatsoever is affixed to the soil partakes of the nature and becomes a part of the realty itself has been much relaxed to meet the requirements of manufacturing industries and trade relations, so that now the question whether an article of personalty, in its original state, has become a part of the freehold, depends upon three conditions: Annexation, real or constructive; adaptability to the use or purpose of the realty to which it is attached; and the intention of the party making the annexation to make it a permanent accession to the freehold. No doubt it was the intention of both Vinson and the defendant company to make the building and mill a permanent accession to the freehold. But the agreement amounts to a *stipulation* that, as between the parties to the agreement, it should remain personalty until the price was fully paid." (Italics ours.) Of course, in the absence of such an express stipulation, the three tests above mentioned should be looked to in order to determine whether the article in question constitutes an irremovable fixture, and, as said in 3 Words and Phrases, 2833, the intention of the parties is controlling. And in ascertaining such intention

Digitized by Google

the manner in which the machinery is affixed and the effect on the realty produced by its removal, are taken into consideration. But when there *is* an express stipulation that the machinery shall remain personalty, and that the seller shall have the right to remove it, if the deferred payments are not made, there is no need of looking for the intention of the parties to see whether it is removable. As said in Tifft v. Horten, 53 N. Y. 377, l. c. 380: "It may in this case be conceded, that if there were no fact in it but the placing upon the premises of the engines and boilers in the manner in which they were attached thereto, they would have become fixtures, and would pass as a part of the realty. But the agreement of the then owner of the land and the plaintiff is express, that they should be and remain personal property until the notes given therefor were paid; and by the same agreement, power was given to the plaintiffs, to enter upon the premises in certain contingencies, and to take and carry them away. While there is no doubt but that the intention of the owner of the land was that the engine and boilers should ultimately become a part of the realty, and be permanently affixed to it, this was subordinate to the prior intention expressed by the agreement. That fully shows her intention and the intention of the plaintiffs, that the act of annexing them to the freehold should not change or take away the character of them as chattels, until the price of them had been fully paid. And as parties may by their agreement expressing their intention so to do, preserve and continue the character of the chattels as personal property, there can be no doubt but that as between themselves, the agreement in this case was fully sufficient to that end." In this case cited the engine and boiler were set up and a house was built over them and the engine was attached to and used to operate machinery in another building on the land. It was held that the engine and

Digitized by Google

boiler remained personal property although not removable without some injury to the building in which it was located. It was also held that, where there was an *express agreement* that the property should remain personalty, the only limitation upon such agreement was where the property could not be removed without practically destroying it or where it is essential to the support of that to which it is attached.

In Lake Superior, etc., Ry. v. McCann, 86 Mich. 106, an engine and boiler and their attachments were set in masonry and firmly attached to the land. There was an express agreement to treat them as personal property, and it was held that they remained personalty and, in view of such express agreement, it became entirely immaterial how they were fastened to the soil or to the buildings.

In Marshall v. Bacheldor, 47 Kan. 442, it is held that, in the sale of personal property to be affixed to realty, the contracting parties at the time of the sale, have the power, *as between themselves,* at least, to fix the status of such property. See, also, 19 Cyc. 1048 as to such agreements, and announcing the rule that the agreement, though not expressly stipulated, may be *implied* from the giving of a chattel mortgage or accepting the property under a conditional sale.

It is true in many cases, even where it is held that the property remains personalty, it is said, speaking in general terms, that a fixture will remain personal property if it can be removed without destroying the article itself, or without serious or material injury to the freehold. But, in nearly all of them, illustrations are used showing that this refers to property that has become so completely merged into the real estate as to lose its identity and its essential character is changed, as for example, the separate bricks, beams, etc., of which the walls of a house are composed. Such a case is Ford v. Cobb, 20 N. Y. 344. In other cases,

Digitized by Google

the rights involved were not confined to the parties to the agreement, but the rights of others had intervened, as, for example, the case of In re Williamsburg Knitting Mill, 190 Fed. 871. In this case, too, there was neither actual nor constructive notice to the third party. The same is true of Holt v. Henley, 193 Fed. 1020. In yet other cases, the reason the stipulation between the parties was not given effect was because to do so would contravene a statute. Such a case is Havens v. Fire Ins. Co., 123 Mo. 403. In that case it was sought to avoid the payment of the full amount of an insurance policy on real property because it was agreed in the policy that certain machinery attached to the realty should be regarded as personalty, but the court held that, as this would contravene the "valued policy" statute, the agreement could not be given effect. The court says, in passing on this case, that while it is true that under the common law whatever is affixed to the soil is thereby made a part of it, yet there are certain well-settled exceptions as to trade fixtures, and as to cases in which property so attached to and made a part of the real estate has, by agreement between the parties, been treated as personal property, in which cases "the law will regard their agreements and so consider it." The case of Ginners, etc., v. Wiley & House, 147 S. W. 629, was also decided in reference to a statute affecting the agreement.

In fact many cases apparently conflicting with the view herein expressed, may be found in other states, but, upon examination, it will be observed that the seeming conflict arises either from the use of general language used to define a fixture, or because of the relation of the parties, or because of what is relied upon to show the agreement whether it is an express written stipulation or is to be inferred from the contract that was made.

Digitized by Google

It should be borne in mind that this is not a case where the articles were first attached to the realty and then were afterward attempted to be treated as personal property. Here, it was personalty, and it was agreed that the property should remain personalty *before* it went upon the real estate. Many of the cases holding void an agreement that certain things should be regarded as personal property are cases where the agreement was made *after* the thing had actually become real estate. There is a difference between agreements made before and after the subject-matter of the agreement has become real estate. [Jones on Chattel Mortgages (5 Ed.), secs. 128, 130, 132a.] Especially where such agreement is merely implied from the giving of a chattel mortgage thereon.

The only limitation on the power of the parties, as between themselves and those claiming under them with notice, to stipulate that property, personal in its essential character, should remain personalty after being attached to the realty, being that it must not be so incorporated into the realty as to lose its identity or essential character as personalty, it follows that the machinery in question remained personal property unless it lost its identity. But there is no evidence that such is the case. In fact it is evident, from all the testimony and the nature of the machinery, that it did not lose its identity. Nor was it destroyed in removing it. It is true there is a statement that some parts were practically destroyed but this only referred to the pieces of iron by which the machinery was fastended in place and not to the machinery itself. There being no question or dispute in the testimony over whether the machinery had lost its identity, and the agreement as to its remaining personalty being in written documents whose authenticity were unquestioned, as was also the fact that defendant had actual notice thereof, and in fact took the property "subject to"

Digitized by Google

the rights of the plaintiff, there was nothing for the court to submit to the jury, and, therefore, the court did not err in directing a verdict for plaintiff.

It is urged that the court should have allowed defendant to prove that certain articles were taken under the writ which were not sold by plaintiff to defendant. These were not in the list of the articles sued for, nor in the return of the sheriff as having been taken by him under the writ. The answer did not set up anything about these alleged additional or outside articles. Nor did defendant ask leave, or offer, to amend the answer so as to include them when the evidence as to such articles was excluded. Consequently those articles are not within the issues made by the pleadings, and the case must not be reversed on that account. The judgment is affirmed. All concur.

C. M. HOPPER, Trustee of the Estate of GEORGE W. THOMPSON, a Bankrupt, Appellant, v. JAY FULBRIGHT and MOSES F. HARDY, Respondents.

Kansas City Court of Appeals, November 17, 1913.

1. **PRACTICE, APPELLATE: Exception to Overruling of Motion for New Trial.** When appellant's abstract of the record fails to show the taking or preservation of any exception to the overruling of the motion for new trial, there is nothing before the appellate court except the record proper.

2. **———: ———: Place of.** An exception to the overruling of a motion for new trial is not a part of the record proper and must, therefore, be preserved in the bill of exceptions. Putting such exception in the record proper does not preserve it.

3. **———: ———: Supplemental Abstract.** Where appellant's original abstract fails to show an exception to the overruling of the motion for new trial, such defect cannot be cured by a supplemental abstract filed after respondents had filed their brief suggesting the defect, and after the date on which appellant was required to file his original abstract.

Digitized by Google

4. ———: ———: ———. Even if the supplemental abstract herein could be considered, it would not cure the defect since it still fails to show that the bill of exceptions contains such exception.

Appeal from Chariton Circuit Court.—*Hon. Fred Lamb,* Judge.

AFFIRMED.

John D. Taylor for appellant.

N. A. House and *O. F. Libby* for respondents.

TRIMBLE, J.—Appellant's abstract of the record failed to show the taking or preservation of any exception to the action of the trial court in overruling his motion for a new trial. After the date on which appellant was required to file his abstract and brief, and after respondents had filed their brief attacking appellant's abstract because it failed to show such exception, and in fact after the cause had been submitted on briefs without argument, appellant filed a supplemental abstract in which the omission above mentioned was attempted to be cured.

Under these circumstances we are confined to an examination of the record proper, and cannot consider anything outside thereof, in passing upon this appeal. An exception to the overruling of a motion for a new trial is not a part of the record proper and must be preserved in the bill of exception. Putting such exception in the record proper does not preserve it. In this case, however, such exception did not appear either in the record proper or in the bill of exceptions. Unless an exception is taken, and preserved by bill of exceptions, to the overruling of the motion for new trial there is nothing before the court for review except the record proper. [Ross v. Railroad, 141 Mo. 390; Hill v. Taylor, 99 Mo. App. 524; State v. Murray, 126 Mo. 526.]

Digitized by Google

The supplemental abstract fails to cure the defect, even if the supplemental abstract could be considered, for the reason that it still fails to show that the *Bill of exceptions* contains the absent exception. But the supplemental abstract came too late. Where appellant's abstract contains a defect such as here noted, he cannot, after respondent has suggested such failure in his brief, be permitted to cure the defect by a supplemental abstract without the consent of respondent. [Harding v. Bedell, 202 Mo. 625, l. c. 636; Everett v. Butler, 192 Mo. 564, l. c. 569; Barham v. Shelton, 221 Mo. 66, l. c. 69; Phoenix Stone, etc. Co. v. Huggins, 136 Mo. App. 209, and many other cases.]

We are, therefore, confined to the record proper, and, finding no error therein, must affirm the judgment. It is so ordered. All concur.

KANSAS CITY, Respondent, v. JOHN FEE, Appellant.

Kansas City Court of Appeals, June 30, 1913.

1. **SCHOOL DISTRICTS: Exercise of Police Power: Amenability of Schools and School Employees to Police Regulations.** A fireman in charge of a steam boiler who was required by a city ordinance to be examined and licensed cannot defend a charge of violating said ordinance by showing that he was employed by the school district to manage said boiler. The ordinance was an exercise of purely police power affecting the health and safety of persons, and freedom from danger of destruction of the property of the city and of its citizens, and was, in no sense an interference with or encroachment upon the authority of the school board or its work of controlling, directing and maintaining its system of education.

Digitized by Google

2. ———: **Municipal Corporations: Spheres of Action Belonging Respectively to the City and the District.** Our laws have committed to the school boards the work of educating, and furnishing free public instruction to, the young of the state, but has not given to such boards governmental police power. That is committed to the city. Neither can interfere with the other in its respective domain. The school district can perform its work and still be amenable to necessary police regulations. In this case the district by its rule admits this, and it is only the employee who attempts to raise this objection on behalf of the district.

Appeal from Jackson Criminal Court.—*Hon. Ralph S. Latshaw,* Judge.

AFFIRMED.

Gage, Ladd & Small for appellant.

The school district of Kansas City is an independent public governmental corporation, and has the sole and exclusive power to provide heating apparatus, of such kind as it may determine, for its school houses, and has the sole power to employ janitors or firemen or other servants, and to prescribe their powers, duties and compensation, and therefore, necessarily, their qualifications. Hence, the city has no power or control whatever, over the heating apparatus or firemen or janitors of said school district while working, therewith, and the ordinance of Kansas City was void and had no application as to the defendant or the heating apparatus he was using. R. S. 1909, secs. 10979, 10980, 10983, 10784; Waterworks Co. v. School District, 23 Mo. App. 236-243; State ex inf. Lowe v. Henderson, 145 Mo. 329; School District v. School District, 184 Mo. 140; City of Milwaukee v. McGregor, 140 Wis. 35, 121 N. W. 642; City of Fulton v. Sims, 127 Mo. App. 677; Kentucky Inv't v. Louisville, 127 Mo. App. 677, 97 S. W. 402. A school district is but an arm of the State. State ex rel. v. Gordon, 231 Mo. 574.

Digitized by Google

A. F. Evans, A. F. Smith and *Hunt C. Moore* for respondent.

An employee of the school district of Kansas City is subject to the provisions of the Revised Ordinances of Kansas City. 1 Freund Police Power, sec. 135; Railroad v. New York, 165 U. S. 628; Railroad v. Arkansas, 219 U. S. 453-462; United States v. Bateman, 34 Fed. 86; United States v. Tully, 140 Fed. 899, 905; Sec. 9764, R. S. 1909; McQuillin Municipal Ordinances, sec. 271, 418; 3 McQuillin Municipal Corporations, sec. 899, p. 1910.

TRIMBLE, J.—This is an appeal from a judgment of the criminal court of Jackson county, wherein appellant was, on an appeal from the municipal court, convicted of a violation of one of the ordinances of Kansas City. That ordinance provides that no person, not a fireman or engineer licensed by the city, shall be in charge of any steam boiler used for heating purposes carrying over fifteen pounds of steam to the square inch, and any person violating such provision shall be deemed guilty of a misdemeanor and fined not less than one dollar nor more than $500 and each day's violation shall be deemed a separate offense. It is admitted that defendant was, at the time of the filing of the information against him, the janitor of the Washington school, one of the public schools, in Kansas City, and as such janitor was directly in charge of its steam heating boiler which carried from twenty-five to thirty pounds of steam to the square inch, and that he was not a fireman or engineer licensed by the city as provided by said ordinance. He was arrested for violating said ordinance, was convicted in the municipal court and again in the criminal court on appeal, and now brings the case here.

The real, and the only, question presented by the defense is whether or not Kansas City has any power

Digitized by Google

or authority to make any regulations governing or binding upon public school employees, when such regulations are prescribed solely in the exercise of the city's police power to provide for the health and safety of its citizens and the freedom from danger by violence of both persons and property, and when such regulations have such objects for their only end and purpose? The defendant does not state the question within these limits. He prefers to make it broader than that and raise the question whether or not the public schools of the city are subject to the government, control and domination of the city in regard to matters in general. And under the wide spreading wings of such a question he cites authorities denying the city such broad and comprehensive power, and urges them as conclusive on the question of whether the city has the narrow authority above set out. This method involves a fallacy so frequently met with as to become familiar although often buried under the cover of much legal argumentation. When stripped of every cover and disguise, the question here is found to be: Are the public schools, or rather more specifically in this case, are the employees of the public schools located within a city subject to those regulations of the city which are purely police regulations and do not involve any other limitation or control?

Our laws vest in the public school authorities the "supervision of instruction" but nowhere gives them governmental *police power*. [R. S. Mo. 1909, secs. 10979, 10980, 10983, 10784.] In other words, the school authorities are supreme in all matters directly, or by implication, involving the subject of education, but with the matter of governmental police regulations, having to do solely with the maintenance of public order and peace, the health, safety and freedom from violence of the citizens of the State and the protection of property from destruction by violence, the school

Digitized by Google

authorities have nothing to do. And it is well for them that they do not.

On the other hand the law vests such authority over police matters in the city. [R. S. Mo. 1909, sec. 9764.] And such authority is given without restriction or exception. Within that sphere, the city has, so to speak, as exclusive authority as the school board has within the sphere of educational matters. Neither can interfere with the other in the exercise of the respective governmental functions confided to each. The work of education and everything necessary or impliedly necessary to the carrying on of the work is committed to the school board, and the city has no right to interfere with that work or direct how it shall be done; and the work of maintaining public order, establishing and enforcing police regulations which preserve the health and safety of persons and property, is committed to the city, and the school board has no right to interfere with that work, nor is it or its employees exempt from such police regulations.

It will not do to say that fining of this janitor fireman for runing a boiler without a city license is an interference with the board in its work of education. To say that the board, in order to be left wholly free to carry on its work of education, must, with its employees, be absolutely free from all matters of purely police regulation, is to say that the board cannot attend to the work of education unless it is allowed to violate, or at least pay no attention to, such regulations. The absurdity of such a statement is its own refutation. Besides, the board, by its rule No. 153, providing that "the janitor of a building heated by steam shall have an engineer's license as required by city ordinance" admits that its work of education is not interfered with by the application and enforcement of such a police regulation. The above rule is material and admissible on this ground if on no other. And,

Digitized by Google

since the board makes this admission, surely it cannot lie in the mouth of this janitor to urge that the freedom of the board in the management of its schools is being interfered with by a judgment of conviction in this case.

Neither can it be denied that the ordinance in question is a pure exercise of police power and a wise and reasonable one. Nor do we understand that defendant contends for a moment that it is not. By inference, however, he contends that the qualification of the janitor fireman in charge of a steam boiler carrying more than fifteen pounds to the square inch is a matter so wholly within the sphere of education and so entirely outside of the sphere of the city's conceded police power, that it must be held that the city has no power to legislate on that qualification. On the contrary, the qualification of the one in charge of such a powerful agency capable of producing disastrous and dangerous results is not a matter within the sphere of, or pertaining to, the work of education at all, but is wholly within the matters of police regulation confided alone to the city and not to the school board. A steam boiler of such capacity, in the hands of an inexperienced and unskilled person, is likely, or at least liable to, explode not only killing and injuring the pupils of the school (who are citizens of the city) but also destroying and setting fire to the building and thereby communicating fire and danger of destruction to the persons and property of the city and of citizens adjacent thereto. To require the school employee, handling such a dangerous agency, to comply with the regulations of the city in regard thereto is no infringement or encroachment upon the power, duties and authority of the school board in its educational work. Nor does it follow that, because such employee is amenable to the police regulations of the city, this makes every other school employee subject to city control.

Digitized by Google

The board's control, management, direction, operation and care of school property, the policy to be followed in school work, the teachers to be selected, and all other matters directly or even merely incidentally connected with the subject of education in general is left free and untrammelled. And it is only in those matters which involve *purely* a police regulation necessary to the health and safety of persons and property, that the city can interfere. To hold that the city cannot interfere even in such matters, or that if it did, it would infringe upon the jurisdiction of the school board in its constitutionally appointed task of providing education for the citizens of the State, is to hold that the city would have no power to quarantine a school teacher or other school employee afflicted, or thought to be afflicted, with a deadly infectious disease, because this would be adding to his qualifications the requirement that he must be free from all such, and an interference with the board in its power to employ whomsoever it will. It is no answer to say that no school board would object to such a regulation. The question now is as to its right or power to object. Suppose there arose a difference of opinion between the school authorities and the city as to whether the employee had such disease, if defendant's contention be true, the board's decision in the matter would control regardless of the results to the city.

Defendant says it is not a question of what power the city ought to have, but of what power the city has. Is it not rather a question of whether the school board and its employees are *exempt* from the operation and effect of such power? In this particular case the question is as to the exemption of the employee only. The act of the city in this case being concededly an exercise solely of police power, and the operation of such power being omnipresent and universal within the city limits, ought not the school employee to be subject

Digitized by Google

thereto unless clearly exempted by law? And where is such exemption? Certainly not by express statute. Defendant says it flows from certain decided cases which he cites. But we do not think they are applicable. Take the case of National Waterworks v. School District of Kansas City, 23 Mo. App. 227, so much relied upon by defendant. That was not in reference to the exercise of police power at all. In that case the waterworks company had obtained from the city a franchise by the acceptance of which the water company bound itself to furnish water "for use in all public buildings and offices of the city . . . and . . . shall not have any pay for water the city may so use or take, etc." The school board refused to pay for the water it used claiming it was entitled to get it free since its buildings were "public buildings of the city" within the meaning of the contract between the waterworks company and the city. This court held they were not since the city exercised no control over them, did not own them and was not responsible for them in any way. While they were "public buildings of the city" in one sense, that is, in the sense that the Long building or the Commerce building of the present day are public buildings, yet they are not "city public buildings" in the sense used in the franchise. This was all that was decided, and the remarks of the court could apply almost as well to the two above named buildings now as to school buildings in distinguishing them as "public buildings of the city" from "city public buildings." The school district in that case urged that even though its buildings did not belong to the city and were not under its supervision, yet the city had authority to exert its power beyond its territorial limits, and, therefore, contracted for the use of free water from buildings beyond those it owned and controlled, and in this way school buildings were entitled to free water. But the court said, in answer

Digitized by Google

to that argument, that such acts of the city were "in the exercise of police power" and therefore could have no application to the case.

We are cited to the case of State ex rel. v. Cole, 220 Mo. 697, but that case dealt solely with the question of the power of the school board to make needful rules for the conduct and management of the school. It had nothing to do with the question of whether or not the school board or a school employee could be required to obey a regulation of the city dealing purely with a police regulation of the city and having nothing to do with the government or control of the school. The question was whether the school board could exclude a child from school who had not been vaccinated. This directly involved the maintenance of the school and of course was within the powers of the board, which was charged with that work.

The case of State ex inf. v. Henderson, 145 Mo. 329, merely decided that the title to school property is vested in the school district as a public, and not as a municipal, corporation; and that the extension of the city limits so as to take in and extinguish Westport did not have the effect of extinguishing the Westport school district. While the court remarks that the school district is independent of the city government, it is speaking of its independence as a separate and district corporation, and not of its nonamenability to regulations involving only the exercise of police power.

The case of School District No. 7 v. School District of St. Joseph, 184 Mo. 140, decides nothing more than that the extension of the city limits of a city of over 50,000 and under 300,000 inhabitants does not, *ipso facto,* extend the limits of the city school district over the territory of the adjoining district included within the extension; and that school districts are distinct corporations from the municipalities in which they are formed.

Digitized by Google

The case of Milwaukee v. McGregor, 140 Wis. 35 is not decisive of the point here because, in that case the State had by special legislative action, unrestrained by any constitutional limitation, authorized the erection of a state building in a particular way in the city of Milwaukee and it was held that, to follow out such supreme legislative command, it was not necessary to first obtain a building permit from the city inspector.

The case of Fulton v. Sims, 127 Mo. App. 677 is not conclusive, since that was a case wherein the city attempted to regulate the conduct of the business of a state institution in a matter *not affecting the rights of the city* or *the health or safety of its citizens,* but solely affecting the institution's own internal affairs which were regulated by express provisions of the statute. And so on with all the cases wherein it was held that the city could not interfere. It will be found that in all of them the act attempted to be regulated was either a matter not involving the exercise of police power, or, if it was, it affected only the internal arrangement or conduct of the business of the institution, and *not the safety or other rights of the city or of citizens outside the institution.*

It has been held that certain state police regulations may be enacted and enforced even though they apply to persons and corporations engaged in interstate commerce, and this too in the face of the rule that Congress has complete supervision over interstate commerce and no state can pass any law interfering therewith. [1 Freund on Police Power, Sec. 135; New York Railroad v. New York, 165 U. S. 628; Chicago, Rock Island, etc. Railroad v. Arkansas, 219 U. S. 453. Such regulations are not an interference with interstate commerce but an aid to it. In like manner, the ordinance in question is not an interference with the school board in its conduct and management of its business of educating the children of the State. Nor

Digitized by Google

is the school board here contending that it is. The board by adopting rule No. 153 admits that the regulation is in keeping with their work, and it is only the individual who has violated both the rule and the ordinance who is now raising the point that he is exempt from the operation thereof.

Under defendant's view of the case the school district, merely because it is a quasi political entity of itself, is supreme in its control over its real estate and is not subject to any regulations of the city. It is not necessary to pass on the correctness of this position as to its control over its real estate, since the question is not involved. But if it is meant that on account of such control, the school board does not have to recognize any police regulations whatever, whether solely affecting the public generally or not, then the result of such theory would be to create little separate and independent kingdoms within the city where the sovereignty given to it by the State could not operate. In other words, there would be "spots" in the city where its laws would have no force. Such theory was advanced in United States v. Bateman, 34 Fed. 86, where it was urged that, as a murder was committed on a military reservation belonging to the United States and over which it had sovereign control, the State of California had no authority to enforce its laws against crime committed there. But the court held otherwise.

The sustaining of defendant's conviction in this case does not mean that the public schools are to be put under the domination and control of city politics or city regulations as to the manner in which the schools shall be conducted or its property cared for and controlled. Heaven forbid such a result. Let us hope that the actual separation of our schools from politics is identical with its separation in theory. Such condition is ideal, and, if it exists in fact, let us keep

Digitized by Google

it so. But the conviction in this case does not tend to destroy that separation. Politics has nothing to do with the qualifications a man should have who is in charge of such a powerful and dangerous agency, as a steam boiler. Nor is the control or authority of the school board involved in any way. The judgment is affirmed. All concur.

J. I. CASE THRESHING MACHINE COMPANY, Appellant, v. W. E. TOMLIN et al., Respondents.

Kansas City Court of Appeals, November 17, 1913.

1. **CONTRACTS: Usury: Law Governing.** The place of performance of a contract, in the absence of an attempt to evade the laws, furnishes the law governing its terms. So, where a chattel mortgage and notes secured thereby were payable in Missouri, were sent to Missouri for collection, and the only one paid was paid in Missouri, they will be considered Missouri contracts, although signed in Kansas, and the Missouri laws against usury will be applicable thereto. Especially is this true where the notes and mortgage were executed pursuant to a contract made in Missouri for the purchase of a machine delivered, located, and used in Missouri, and there is nothing to show that the parties had any thought of contracting with reference to the laws of any other state.

2. **———: ———: Intent of Parties.** When there is nothing in the contract saying specifically what state shall govern the contract, it may be inferred from all the terms of the contract taken in connection with all the circumstances surrounding the transactions. While the residence of a party to a contract is, or may be, a significant fact, in determining what law the parties had in view, yet it is only a fact to be considered with other facts bearing on that question.

3. **———: ———: Jury Question: Directed Verdict.** Although the question as to what law should govern a contract may sometimes depend upon the intent of the parties, yet this does not require the submission of the question to a jury where all the facts are admitted, and but one inference can be drawn from them.

Digitized by Google

4. ———: **Notes Bearing Unlawful Rate After Maturity.** Our statutes forbid the taking of more than eight per cent per annum as interest. And, as such statutes make interest include any sum taken, directly or indirectly, for "forbearance" as well as for the "use" of money, a note bearing a lawful rate before maturity and an unlawful rate after that time, becomes usurious if forbearance is exercised and the unlawful rate is charged or exacted. If the sum charged or exacted for the use of money loaned exceed the legal interest, it is usury no matter what words it may be clothed in.

Appeal from Platte Circuit Court.—*Hon. A. D. Burns*, Judge.

AFFIRMED.

Kirkpatrick, McCollum & Kirkpatrick, and *J. H. Hull* for appellant.

Wilson & Wilson and *Guy B. Park* for respondents.

TRIMBLE, J.—Appellant sold respondents a threshing machine and took an old one in part payment of the purchase price and, for the remainder, took eight notes, aggregating $1500, secured by a chattel mortgage on the new machine. These notes bore six per cent interest until due and ten per cent after maturity. The first note was not paid until some time after it was due, and, when it was paid, the company exacted and received the full amount of interest thereon including the ten per cent from maturity.

Defendants complained that the machine did not work according to warranty, and, after appellant had spent some time in endeavoring to make it work and had failed according to defendants' view, the latter refused to pay the remaining notes. There was a provision in the mortgage rendering all the notes due and

Digitized by Google

payable in case any one of them became due and remained unpaid. And when this occurred, the company brought this suit in replevin, under its chattel mortgage to recover the machine. It was taken from defendants by the sheriff under the writ, and, upon appellant giving bond, the machine was delivered to it.

The defendants set up, among other defenses, that appellant had charged and exacted usurious interest on the first note, and that the chattel mortgage was invalid by reason of usury in the notes secured thereby. Appellant, in reply, pleaded that the chattel mortgage and notes constituted a Kansas contract, and that, under the pleaded statutes of that state, ten per cent interest was a lawful rate.

After all the testimony bearing upon the question of usury had been offered, agreed to, and admitted by both sides to be true, the court ruled that under the admitted facts the mortgage was invalid because of usury, and sustained defendants' demurrer to the evidence. Thereupon, without waiving any point on either side, it was agreed that the value of the machine was $1000 and that the damages for its taking and detention were $125. The jury was then directed to find for defendants and against plaintiff, which was done, and plaintiff appealed.

The law in Missouri is that a greater rate of interest than eight per cent is usurious (sections 7180, 7182 Revised Statutes 1909), and a mortgage securing an usurious rate is invalid. [Sec. 7184, R. S. Mo. 1909.] Therefore, if the mortgage fails, plaintiff's replevin suit, based thereon, must also fail.

Our statute, section 7182, makes interest include any sum taken, directly or indirectly, for "forbearance" as well as for the "use" of money. Consequently a note, bearing a lawful rate before maturity and an unlawful rate after that time, becomes usurious if forbearance is exercised and the unlawful rate is charged

Digitized by Google

or exacted. [White v. Anderson, 164 Mo. App. 132.] "If the sum charged or exacted for the use of money loaned exceed the legal interest, it is usury no matter what words it may be clothed in." [Coleman v. Cole, 158 Mo. 253 l. c. 260.] The case of Taylor v. Buzzard, 114 Mo. App. 622, does not conflict with this rule. In that case the test of usury in a contract is said to be "whether it would, if performed, result in securing a greater rate of profit on the subject matter than is allowed by law." There is a difference between a penalty or forfeiture for *not performing* a contract according to its terms, and the exaction of interest as a part of its terms.

But ten per cent interest is a legal rate under Kansas law. Hence, if the contract claimed to be usurious is a Kansas and not a Missouri contract, it has no taint of usury in it.

The facts bearing on this question are admitted, so that if, as a matter of law, it is a Missouri contract, there was no error in directing a verdict. Those facts are as follows: The chattel mortgage and notes grew out of, and were provided for in, a contract for the sale of the machine which was drawn up in Kansas City, Missouri, by appellant's agent, and there signed by respondents. In form, it was an order, dated Kansas City, Mo., June 13, 1911, addressed to appellant, requesting it *to ship, or deliver,* to Beverly, or other convenient station *in the State of Missouri,* in care of appellant, for purchaser, the machine in question. In consideration of which, purchaser agreed *to receive same on cars on arrival,* subject to warranty thereinafter stated, and to pay freight and charges, and to execute eight notes, bearing six per cent until maturity and ten per cent after that date, and secured by chattel mortgage on the machine. The contract further provided that, if purchaser failed to execute the notes and mortgage, the contract should, at the com-

Digitized by Google

pany's option, have the same force and effect as a mortgage for all sums not paid in cash, and the whole amount of purchase money should be due and payable. The warranty in the contract provided what the machine should do, and, if it failed to fulfill the warranty, purchaser was to give the company written notice, and the company was to send a man to remedy the difficulty, the purchasers to render friendly assistance. If the company failed to send a man, or if, after sending him, he failed to make the machine fill the warranty, the part failing to work was to be returned by the purchaser to the place where the machine was received and the company notified, whereupon the company had the option to either furnish another machine, or part, or return the notes or money received for the machine or part so returned. If crops in purchaser's vicinity were a failure, and written notice thereof was given before shipment, the delivery of the machine could be deferred one year. If purchaser refused to accept said machinery, or if he cancelled the order, he agreed to pay the company the freight and charges on the machinery from the factory to the place of delivery.

The foregoing provisions of the contract are stated here, not as bearing on the warranty, but as throwing light on the question what was the situs of the contract in the minds of the contracting parties.

In addition to these provisions, there was endorsed on the contract a statement signed by the agent that the machine was to be located in Platte county, Missouri, and that the makers of the notes wanted them sent to Platte City, Mo., for collection. This statement gave the post office address of the purchasers as Leavenworth, Kansas.

It was admitted that, at the time this order was given, the defendants requested that the notes be sent to Platte City, Missouri, for collection as more convenient for them since the machine was to be sent to that

Digitized by Google

county and they would be threshing wheat therein near Platte City. Upon a property statement attached to the contract was a statement by the defendant, W. E. Tomlin, that *his wife* owned a 230 acre farm in Platte county, Missouri, worth fifty dollars per acre, and also a similar statement by the defendant, Elbert Cecil, that he owned a farm of 230 acres in Platte county, Missouri. The chattel mortgage was drawn up to be, and was, executed by W. E. Tomlin and Belle Tomlin, his wife, but the notes were signed by W. E. Tomlin and Elbert Cecil, and the suit is against all three of them. Endorsed on this contract is the following: "For account of local sales at Kansas City, State of Missouri." Pursuant to the contract the company shipped the machine to Beverly in Platte county, Missouri, and defendants received it there; and the old machine, taken by the company in lieu of a $1000 cash payment above the $1500 in notes provided for, was delivered to, and received by the company, in Platte county, Missouri. As the statement attached to the contract gave defendants postoffice address at Leavenworth, Kansas, the chattel mortgage and notes were sent to a bank there and defendants executed them in Leavenworth. The notes, by their terms, were payable at the Wells Banking Co's. Bank in Platte City, Missouri.

The defendants immediately began threshing with the new machine in Platte county, Missouri, but, as the machine did not work to defendants' satisfaction, the company was notified pursuant to the contract, and it sent men to Platte county, Missouri, who endeavored for some time to make the machine work properly. These men were sent three or four times. The notes were sent to Platte City for collection, or at least the one that first became due was, which was the one defendants paid with ten per cent interest from maturity. At the time of doing so, defendants objected to paying

Digitized by Google

ten per cent interest but the company exacted and received it.

It can be seen, from the uncontroverted facts above set forth, that all the important elements of the transaction had their situs in Missouri. It originated in Missouri, the contract for the purchase of the machine and the execution of the notes and mortgage was signed in Missouri, at least by defendants; the machine was to be shipped to and delivered in Missouri and used in that state, and was in fact delivered to, and received by defendants and used by them in said state; the old machine was delivered to the company in Missouri; the company sent the notes for collection to Missouri, and one of them was paid in this state; the company agreed to, and did, send men to the machine, who worked upon it in endeavoring to make it run satisfactorily, and this was done in Missouri. In fact, everything about the transaction took place in Missouri, except the act of signing the chattel mortgage which was done at the bank in Leavenworth. And the only possible reason for sending it there for execution was that, inasmuch as the statement attached to the contract gave Leavenworth as the defendants' postoffice, that was the most convenient place to send it for execution. The obligation to give the mortgage was not entered into in Kansas. The contract signed in Missouri already provided for the mortgage, and obligated defendants to execute the notes and mortgage; and, if they should refuse, the contract itself became a mortgage securing the debt past due and unpaid. The property, under the contract, was intended for use in Platte county, Missouri, was actually there when the mortgage was signed, and, in case of default, the mortgage provided that the company should take it wherever found and sell it with or without notice. Presumably, this would be in Platte county, since the machine was for use therein. So that there is nothing in the evidence tend-

Digitized by Google

ing to show that the parties regarded it as a Kansas contract, or as anything other than a Missouri contract.

There is nothing in the contract or mortgage expressing the intention of the parties as to what state it should be considered a contract of, except the provision in the notes making them payable in Missouri. When this "is not specifically expressed in the contract, it may be inferred from all the terms of the contract *taken in connection with all the circumstances surrounding the transactions.*" [39 Cyc. 898.] "When all of the important elements of a loan transaction have their situs in the same state—that is, when the contract is made, the consideration is given, and payment is to be made all in the same place, it is evident that such state must give the law to the transaction wherever suit may be brought even though the result of applying such law will be to render the obligation usurious as against the law of the creditor's residence." [39 Cyc. 899.] The mere fact that the mortgage and notes were signed in Kansas does not make them Kansas contracts. Because, although the residence of a party to a contract is, or rather may be, a signfiicant fact in determining the law applicable, yet it is only a fact to be taken into consideration with other facts in determining what law the parties had in view, and will readily yield to a manifest intent to contract with reference to the law of some other place. [39 Cyc. 904.] It is true usury inheres in the loan and not in the property given to secure its payment. "But since the intent of the parties largely determines to what law the contract is referable, the situs of the property mortgaged to secure the debt, taken in connection with other elements of the transaction, frequently enables the court to determine that the parties had in mind the same situs for the whole transaction." [39 Cyc. 906.] It must be remembered

Digitized by Google

that, if any inferences are to be drawn in this case, they must come from the contract agreeing to purchase a machine and give a mortgage therefor and not from the act of signing the mortgage, since its execution was only a mere compliance with the contract theretofore entered into. But, when we turn to the contract and look at all the circumstances surrounding the transaction, we finding nothing from which can be drawn an inference that a Kansas contract was in contemplation.

In the absence of an attempt to evade the laws, the place of performance of a contract furnishes the law governing its terms. [Smoot v. Judd, 161 Mo. 673, l. c. 684; Central National Bank v. Cooper, 85 Mo. App. 383; Trower Bros. v. Hamilton, 179 Mo. 205; Vennum v. Mertens, 119 Mo. App. 461; Johnson v. Noble Machine Co., 144 Mo. App. 436.] In this last case the notes were signed in Missouri but payable in Indiana and they were held Indiana contracts. In Bank v. Cooper, supra, the note was signed in Missouri but was payable in Kansas. It was held a Kansas contract. So that even if the notes be considered without reference to any other contract or to the transaction out of which they grew, yet, as the notes were payable in Missouri, the laws of that state should govern. The case of Davis v. Tandy, 107 Mo. App. 437, does not hold to the contrary. On page 447 it says: "The rule is, that the law of the place of performance (that is, in this case, the place where the note was to be paid), governs the contract." It is true, in the absence of any express stipulation of the parties as to which law shall govern, *and, in the absence of any evidence showing what law should govern,* it will be *presumed* that the contract was made with reference to that law which recognizes it as valid. But, when that evidence is present and shows which law was intended, then such presumption vanishes.

Digitized by Google

As usury taints a transaction from inception to close, the case cannot be confined merely to the signing of the notes and the place of their execution, but the whole matter may be considered. At the time the contract was made, it was agreed that the notes should be made payable at Wells Banking Co., Platte City, Mo., and they were made payable there, and were sent there for collection. Every act to be done, and which was done, by either party in reference to the subject of the contract, had its situs in Missouri, and no reference was made to Kansas except that defendants' post-office address was there.

It was urged that the question as to what law should govern the contract depends upon the intent of the parties, and hence the question whether it was a Kansas or Missouri contract should have been submitted to the jury by appropriate instructions. But intent is shown by outward acts, by what was done, the nature of the contract, and when and where it is to be performed. All these things were admitted. There was no issue of fact to be submitted. Hence the court did not err in directing a verdict. The judgment is affirmed. All concur.

GEORGE BURT AND ESSIE BURT, Respondents, v. ERMA GABBERT, Executor of the Estate of THOMAS L. GABBERT, deceased, Appellant.

Kansas City Court of Appeals, November 17, 1913.

1. **EXECUTORS AND ADMINISTRATORS: Estates: Claim for Services.** The plaintiffs instituted this suit to recover from the executor, compensation for services rendered to the deceased, during his life time. The deceased lived at the home of plaintiffs, one of whom was a daughter, during the latter period of his life with the understanding that he would compensate them therefor. *Held*, that a plaintiff must recover, if at all, upon a contract either express or implied and in the

Digitized by Google

absence of a showing of the existence of a mutual intention or understanding, that the services were not to be gratuitous, there can be no recovery.

2. ———: ———: ———: **Joinder of Parties.** Where a husband and wife rendered services to the parent of the latter, under an implied agreement that the services were not to be gratuitous, they might join in an action to enforce such a contract.

3. **INSTRUCTIONS: Undisputed Facts.** An instruction is erroneous which directs a verdict on a claim for pasturing and boarding a horse on the mere finding by the jury of the fact (not undisputed) that plaintiff did render such services.

4. ———. An instruction, which tells the jury to return a verdict for plaintiffs, on the finding that they intended to charge for the valuable services they were to render without requiring the jury to find further that deceased was aware of their intention and on his part intended to pay for such services, is erroneous.

Appeal from Platte Circuit Court.—*Hon. A. D. Burnes,* Judge.

REVERSED AND REMANDED.

James H. Hull and *Ardcy Gabbert* for appellant.

Wilson & Wilson, Guy B. Park and *A. D. Gresham* for respondents.

JOHNSON, J.—This suit originated in the probate court of Platte county on a demand filed by plaintiffs, who are husband and wife, against the estate of Thomas L. Gabbert, deceased, who was the father of Mrs. Burt. The demand is itemized and is based on personal services rendered by plaintiffs during the years 1908, 1909, and 1910, in boarding and caring for Gabbert and in pasturing and boarding his horse. Plaintiffs recovered judgment for $300 in the circuit court where the cause was tried on appeal and defendant appealed.

The principal contention of defendant is that the evidence fails completely to show that Gabbert en-

Digitized by Google

tered into any contractual obligation to pay for the services he received at the hands of plaintiffs but on the contrary does show that plaintiffs rendered the services gratuitously.

The evidence of plaintiffs discloses the following facts: In 1908, shortly after his wife died, Gabbert, who was old and in poor health, began living with plaintiffs. He was a man of substance and had been living with one of his sons on a neighboring farm but became dissatisfied and moved to the home of plaintiffs, taking with him some of his personal belongings, including an old horse. He was not given a room in the house of plaintiffs, but lived in a small house in their yard and took his meals with them. His room was comfortable and well furnished and was kept in order by his daughter. The old man was afflicted with asthma, expectorated profusely, and is described by some of plaintiffs' witnesses as being uncleanly in some of his habits. They state further that he had some affection of the kidneys and bowels which, at times, caused him to befoul his bed. Plaintiffs cleaned up after him and took good care of him, for which services they charged ten dollars per week in the demand under consideration. Though in poor health, Gabbert, almost to the day of his death, was able to travel and he spent a great part of his time away from home visiting his other children and on trips to Texas. Plaintiffs' claim for services rendered during a period of almost three years at ten dollars per week and including the pasturage and board of the horse at the rate of one dollar per month in the summer and five dollars per month in the winter, amounted in all to $462.64. There is evidence tending to show that the services were reasonably worth that sum.

The evidence of defendant is to the effect that the old man was able to take care of himself, was not afflicted with any uncleanly disease and required no

Digitized by Google

more care or attention than any other man of normal health and decent habits.

Plaintiffs introduced a number of witnesses whose testimony discloses an intention and understanding on the part of Gabbert that the services plaintiffs were rendering were to be adequately compensated. To one witness he talked about selling his farm and said, "No, I won't sell it; I can't get as much for it as I want. I am going to stay with George and Essie (plaintiffs) and I expect to pay them for keeping me." . . . . "I expect to pay George and Essie well for staying with them. I can't stay at home now." Another witness testified: "He said he expected to pay them for boarding him and boarding the mare." To another he said: "I am going to pay Mr. Burt and Mrs. Burt for keeping me, boarding me what time I am here. I haven't got any place to stay except there for a home."

The sheriff of Platte county testified: "I had a conversation with Mr. Gabbert the year he rented his farm to his son who was to come from Oklahoma here. It was that fall. He said he was living in the house at the time and Erma (his son) was coming to take possession of the farm. I don't remember what year it was. Between 1908 and '10. I went there to see some cattle. He was out in the yard when I rode up. He appeared to be angry. We went to the back part of the farm where the cattle were. He told me he had bought some cord wood; said he was fixing to go over to Burt's to get his dinner. He said the parties living in his house—Linsey was living in his house—wouldn't cook him nothing that he could eat, . . . and he was boarding over at Burt's; that we would go over there at Burt's and eat our dinner and he would pay for it; that he expected to pay for what they done for him there."

The evidence from which we have quoted shows quite clearly that Gabbert had no thought of being the

Digitized by Google

recipient of gratuitous services from his daughter and son-in-law but recognized an obligation to compensate them. He looked upon himself as a boarder who must pay for what he received, not as an aged parent being honored by the voluntary offerings of filial love and reverence. And from evidence showing that such was his understanding of his relationship to plaintiffs, the inference may be drawn that they had the same understanding and that the services were rendered on an implied agreement that they were to receive pecuniary compensation. [Stone v. Troll, 134 Mo. App. 308; Hayden v. Parsons, 70 Mo. App. 493; Lillard v. Wilson, 178 Mo. 145.]

We think plaintiffs discharged their burden of showing affirmatively the existence of a contractual understanding between them and Gabbert, which is the test of the right to recover compensation in cases of this character (Woods v. Land, 30 Mo. App. 176; Crowley v. Dagley, decided by this court at this term) and that the learned trial judge did not err in refusing defendant's request for a peremptory instruction.

There is no merit in the point made by defendant of a misjoinder of parties plaintiff. We held in Brinton v. Thomas, 138 Mo. App. 64, that where a husband and wife rendered services to a parent of the latter under an implied agreement that the services were not to be gratuitous, they might join in an action to enforce such contract, and we perceive no reason for changing that rule or for refusing to apply it in the present case.

Two of the instructions given at the request of plaintiffs are as follows: "The court instructs the jury that if they find from the evidence in this case that the deceased pastured and boarded his horse with plaintiffs, then plaintiffs are entitled to such sum for boarding and pasturing said horse as you may believe from the evidence they are entitled to, not to exceed the sum of seventy-four dollars."

Digitized by Google

"The court instructs the jury that where services are rendered and received, a contract, or hiring, or obligation to pay will be presumed, but a presumption may arise from the relationship of the parties that the services rendered are acts of gratuitous kindness, and in this case it is a question for you, taking into consideration all the circumstances, including the nature and degree of this relationship of the parties, and their circumstances in life, to determine whether there was any implied contract for compensation or not.

"In this connection the court further instructs the jury that if you find from the evidence in this case that plaintiffs rendered valuable services to Thomas L. Gabbert, deceased, father of one of the plaintiffs, Essie Burt, and father-in-law of the other plaintiff, George Burt, in boarding him, caring and washing for him, and that said plaintiffs intended to charge said Thomas L. Gabbert, deceased, for the same, and that such services were necessary for the comfort and well being of said Gabbert, then your verdict will be for the plaintiffs in such sum as you may believe from the evidence in the case they are entitled to, not to exceed the sum of three hundred eighty-eight dollars and sixty-four cents ($388.64)."

The first of these instructions is erroneous because it directs a verdict on the claim for pasturing and boarding the horse on the mere finding by the jury of the fact (not disputed) that plaintiffs did render such services. There is evidence in the record from which the jury well might have found that this old man was received by plaintiffs as an honored guest and was suffered to bring with him the property he needed or thought he needed for his personal use without any thought or intention that he should be required to pay for any of the services or benefits he should receive at the hands of his child and son-in-law. On such hypothesis plaintiffs would not be entitled to

Digitized by Google

recover on the claim for pasturing and boarding the horse.

The last instruction above quoted omits from its hypothesis a most essential element of plaintiffs' right to a recovery. It tells the jury to return a verdict for them on the finding that they intended to charge for the valuable services they were to render, without requiring the jury to find further that Gabbert was aware of their intention and on his part intended to pay for such services. As we said in Woods v. Land, supra: "There must be a recognition of a contract by both parties. There must be an expectation, not only of the one to pay, but of the other to receive pay. This recognition and expectation, in other words, the contract, must exist at the time of rendering the service sued for. The status between the parties must be such as creates a legal obligation such as could be enforced at law."

Plaintiffs must recover, if at all, upon a contract either express or implied and in the absence of a showing of the existence of a mutual intention or understanding, that the services were not to be gratuitous, there can be no recovery.

Other points made by defendant are found to be without merit. The attack of plaintiffs on the abstract of the record as being insufficient to bring the bill of exceptions before us is not well grounded as will appear by reference to rule 26, of this court.

For the errors noted in plaintiffs' instructions numbered 5 and 6, the judgment is reversed and the cause remanded. All concur.

Digitized by Google

A. NEWMAN, Trustee of the Estate of A. A. CURTIS, Bankrupt, Appellant, v. TOOTLE-CAMPBELL DRY GOODS COMPANY, Respondent.

Kansas City Court of Appeals, November 17, 1913.

1. **BANKRUPTCY: Preferred Creditors: Voidable Preference.** In order for the trustee of a bankrupt to recover the amount of a voidable preference of creditors four elemental facts must combine. First, the insolvency of the debtor at the time of the preference; second, the giving of the preference within four months of the petition in bankruptcy; third, the effect of securing to the favored creditor a greater percentage of his debt than other creditors of the same class may obtain from the estate of the debtor; and fourth, that the preferred creditor, when he received the preference knew or had reasonable cause to believe that it was the purpose of his debtor to give him a preference over the creditors of the same class.

2. ———: ———: **Natural Presumptions.** When a debtor pays and a creditor receives the amount of a just debt, the natural presumptions are in favor of the good faith of the transaction. Merchants and other business men constantly continue to make payments up to the very eve of failure, and it would be disastrous to have them set aside on slight proof or mere suspicion.

3. ———: ———: **Knowledge of Creditor.** The creditor is not to be charged with knowledge of his debtor's financial condition from mere suspicion in his mind of possible insolvency, nor is it essential that the creditor should have actual knowledge of or believe in his debtor's insolvency, but he should have reasonable cause to believe his debtor to be insolvent. If facts and circumstances, with respect to the debtor's financial condition, are brought home to him, such as would put an ordinary prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose.

4. **DEFINITIONS: Insolvency.** By insolvency, with reference to a person, is meant not one who "was unable to pay his debts as they become due in the ordinary course of his daily transactions" but one whose property "shall not at a fair valuation, be sufficient in amount to pay his debts."

Appeal from Buchanan Circuit Court.—*Hon. Chas. H. Mayer,* Judge.

Digitized by Google

AFFIRMED.

McClintock & Quant and *Spencer & Landis* for appellant.

Robert A. Brown for respondent.

JOHNSON, J.—Plaintiff, trustee of A. A. Curtis an involuntary bankrupt, sued to recover the amount of a voidable preference which defendant, a creditor of Curtis, is alleged to have received within four months of the filing of the petition in bankruptcy. The answer is a general denial. The jury returned a verdict for defendant and the case is here on the appeal of plaintiff.

Defendant is a wholesale merchant doing business in St. Joseph and Curtis, who was a retail merchant at Agra, Kansas, a town two hundred and fifty miles west of St. Joseph, was a customer of defendant. In March, 1911, Curtis was indebted to defendant on an open account and on notes given in settlement of a past due account in an amount approximating $1800. In the preceding month an agent of defendant had called on Curtis and obtained from him a written statement of his financial condition which showed that he not only was solvent but was in good financial condition and entitled to further credit. After receiving this statement defendant accepted and filled an order from Curtis amounting to about $600 but Curtis sold his business before the delivery of the goods and they were returned to defendant. The sale to which we have just referred occurred about March 20, 1911, and the first notice defendant received of it came from a mercantile agency. Defendant immediately sent an adjuster to Agra who was informed by Curtis that he had sold his business, had been paid the larger part of the purchase price and had paid all his debts except that to defendant. The adjuster testified that Curtis

Digitized by Google

stated "I have settled with everyone except the Tootle-Campbell Dry Goods Company and was going to get to them to-day." The adjuster learned that Curtis still held a note of $600 given him in part payment of the purchase price of the business and a claim of $912 against a physician for an automobile Curtis had sold the physician and that both of these demands were good. Further Curtis declared that he had accounts receivable from which he expected to collect more than enough to enable him to discharge his obligations to defendant. He proposed to give the adjuster his check for $900 dated ahead a week and to pay the remainder of defendant's claim from the proceeds of collections. The adjuster referred this proposal to the credit man in a telegram in which he said: "Things look badly here. Whittinghill (referring to the agent who had procured the financial statement from Curtis) should have made a different report. Stock invoiced about five thousand; party paid thirty-five hundred cash and note for six months for stock. Believe Curtis has paid nearly everyone but us the thirty-five hundred checked out; about one thousand of it on a deal he will turn April first, notes from collections he insists he will get within two weeks; has about twelve hundred out considered good. . . . Banker thinks Curtis will do as above if I accept this settlement. Shall I take check and notes or open accounts? Wire instructions soon as possible."

This telegram was sent March 24, 1911, and was answered by the credit man the same day in the following telegram: "You may allow until April 1st for party to meet his entire account if he secures you absolutely. Accept no checks unless certified. Checks may be post-dated if secured, but no future settlement even on short time will be accepted unless absolutely good security given for entire account. Debtor has preferred other creditors and we would prefer to throw the estate into bankruptcy rather than submit

Digitized by Google

to extensions unless unquestionably good security given. See party again and wire result. Stay on ground until something done."

Subsequent telegrams passed between the adjuster at Agra and the credit man at St. Joseph but it is not necessary to refer to their contents since they disclose nothing further relating to the knowledge the adjuster had acquired of Curtis's true financial condition at the time he made the settlement in controversy. After much negotiation and some sharp verbal controversy the adjuster finally induced Curtis to assign to defendant the note of $600 given by the purchaser of the business and the account of $912 against the physician, and the adjuster agreed that the remainder of the debt should be paid by Curtis out of the proceeds of future collections of his accounts receivable which, it appears, the adjuster believed amounted to $1200 of collectible accounts. Defendant realized $1495.15 from the assigned note and account and it is this sum plaintiff is attempting to recover in this action. It turned out that the accounts receivable, from which Curtis promised to pay the remainder of defendant's debt, did not amount to much more than $300, and that they were worthless. Further it became known to defendant, but not until after the payment in question had been received, that Curtis had not paid all his other creditors but owed unsatisfied debts amounting in all to about $1400. While at Agra and during the negotiations leading to the settlement, the adjuster made inquiries of the banker with whom Curtis had been doing business and learned from him that Curtis had paid out to creditors all of the cash received from his vendee, and the banker expressed the belief that he owed no other debts. In depositions taken and introduced by plaintiff, facts and circumstances are related by witnesses which tend to show that the adjuster, before he received the payment, had knowledge of the fact, now conceded, of the insolvency of

Digitized by Google

Curtis, but this evidence is contradicted by the adjuster and we think by the testimony of Curtis. After making the settlement, the adjuster left Agra to attend to other business but returned on March 28th and on that date wrote two letters to the credit man in which he said: "Curtis has left nothing we can get; practically all his accounts collected. Think we are extremely fortunate under circumstances securing note, merchandise and order only thing saved us. . . . Curtis has skipped out owing several local bills, owes a widow here five dollars on house rent. It seems now that he was both a liar and a crook, just what I told him he was before I got through with him."

Counsel for plaintiff attack a number of the rulings of the court on instructions and on the admission of evidence, but in what we shall say on the point that the verdict and judgment are unsupported by any substantial evidence we shall answer the principal objections to the rulings on the instructions. Those addressed to the rulings on evidence have been carefully examined and are found to be without merit. It is contended that the evidence indisputably shows that by accepting the payment in question defendant obtained a voidable preference as that term is understood in the bankruptcy law which recognizes two kinds of preferences—those which a creditor acting in good faith may accept and retain, and those which are forbidden and may be avoided at the suit of the trustee of the bankrupt.

Four elemental facts must combine to render a preference voidable, viz.: First, the insolvency of the debtor at the time of the preference and by insolvency, as that and equivalent words are defined in the existing law, reference is made not to a person who "was unable to pay his debts as they became due in the ordinary course of his daily transactions" but one whose property "shall not, at a fair valuation, be sufficient in

Digitized by Google

amount to pay his debts." [In re Louis A. Eggert, 3 Am. Bankruptcy Reports, 541.] Second, the giving of the preference within four months of the petition in bankruptcy. Third, the effect of securing to the favored creditor a greater percentage of his debt than other creditors of the same class may obtain from the estate of the debtor, and, fourth, that the preferred creditor, when he received the preference, knew or had reasonable cause to believe that it was the purpose of his debtor to give him a preference over other creditors of the same class. [See Gill v. Safe Co., 170 Mo. App. l. c. 485.]

The presence of the first three of these elements in the transaction under consideration must be conceded. The payment to defendant was made within four months of the filing of the petition in bankruptcy. Curtis was insolvent at that time, since it clearly appears that his assets, at a fair valuation, were insufficient to pay his debts and the effect of the payment to defendant was to give it a larger percentage of its debt than other creditors of the same class will obtain from the estate of the bankrupt which appears to be of no value. And the further concession must be made that Curtis, when he assigned to defendant the purchase price note and the account for the automobile had knowledge of the fact of his insolvency and intended to give defendant a preference forbidden by law. Consequently the case is reduced to a single question, i. e., Do the facts and circumstances in evidence, about which there is no dispute, indisputably show that defendant, when it received the preference had actual or constructive knowledge of facts which, plus such knowledge, would make the preference voidable?

Judicial expressions on the subject of what will and what will not constitute constructive knowledge emphasize the distinction between notice of facts and circumstances which would incite a man of ordinary prudence to an inquiry under similar circumstances,

Digitized by Google

and notice of circumstances that would merely excite suspicion. The former is equivalent to notice of all the facts which a reasonably diligent inquiry would disclose (Coder v. McPherson, 152 Fed. Rep. 951), while the latter is deemed insufficient to constitute reasonable cause to believe that a preference is intended and will not put the creditor upon inquiry. It is said in Tumlin v. Bryan, 165 Fed. Rep. 166:

"When a debtor pays, and a creditor receives, the amount of a just debt, the natural presumptions are in favor of the good faith of the transaction. To let the mere fact of the bankruptcy of the debtor within four months make the transaction involved voidable would be to create uncertainty and uneasiness as to the probable result of every settlement between debtor and creditor. Reasonable cause to believe that a preference was intended cannot be held to be proved by circumstances that would merely excite suspicion. And circumstances may seem suspicious after the bankruptcy occurs that would not appear unusual at the time of their occurrence, and would then have presented no 'reasonable cause' on which to found a belief of intended preference. Merchants and other business men constantly continue to make payments up to the very eve of failure, and it would be disastrous to have them set aside on slight proof or mere suspicion. [Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971; Stucky v. Masonic Savings Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640.]"

And in In re Eggert, 102 Fed. Rep. 735, the rule thus is stated:

"The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of, or believe in, his debtor's insolvency, but that he should have reasonable cause to be-

Digitized by Google

lieve his debtor to be insolvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the debtor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose."

Turning to the circumstances in evidence, we find nothing in them to contradict the testimony of the credit man to the effect that when he received the information that Curtis had sold out, he believed, and had cause to believe, that Curtis was solvent. He had before him a recent, written statement from Curtis which showed his net worth to be over $5,000 and on the strength of that statement had just shipped a large quantity of goods to him on credit. Actions speak louder than words and it would be impossible to think that defendant would have been willing to send goods of such value to a merchant of whose solvency it had even a doubt or suspicion. Nor was there anything in the fact that Curtis had sold out without notice to his largest creditor to arouse more than a suspicion or to cause defendant to take any other step than that of sending out an agent to obtain a satisfactory settlement of its claim. It is quite an ordinary occurrence for an honest and solvent merchant to sell his business and it is usual for creditors to regard and treat such an act as calling upon him for the immediate payment of his debts. Diligence of a creditor in such case cannot be construed as evidence of a belief or even of a suspicion that his debtor might be insolvent. The only thing that the credit man knew was that a customer he believed to be solvent had sold out and that a satisfactory settlement of his indebtedness was in order and should be effected with usual business celerity.

The inference is reasonable and in fact very strong that the adjuster made the settlement in ignorance of the fact of Curtis's insolvency and that he pur-

Digitized by Google

sued the usual course of investigation and inquiry. He made inquiries of Curtis, the banker, the purchaser and others, and what he heard from these various sources tended to corroborate the statement of Curtis that he had paid his other debts and had remaining available assets amounting to almost one thousand dollars in excess of his liabilities to defendant. Should we say, as a matter of law, that he should have made other investigations and inquiries? We think not, and hold that the question of whether or not he received notice of circumstances that would have incited a man of ordinary prudence to further inquiry is shown by all the evidence to involve an issue of fact for the jury to solve. There is nothing in the telegram he sent the credit man on March 24th to accuse him of bad faith. His statement that "things look badly here" when read in the light of its context does not convey the idea that the fact of insolvency had been discovered. The statements following distinctly negative that idea in the assertions that Curtis had paid his other debts and had property enough to satisfy defendant's claim. If Curtis had no other creditors, he could not, whether solvent or insolvent, make a transfer of property to pay or secure defendant's demand that would be illegal or voidable under the Bankrupt Act. We must assume that the adjuster endeavored to report the facts to his superior as he understood them, and it is manifest that at the time he wrote that message he had no thought of attempting to secure a voidable preference and had no notice of facts and circumstances that would impugn the verity of the facts he reported.

Much stress is laid by plaintiff on the threat in the credit man's reply telegram that he would throw the estate into bankruptcy. The only source of recent information respecting the affairs of Curtis the credit man possessed was the adjuster who had just informed him of facts which would give no ground for the

Digitized by Google

belief that Curtis had committed acts of bankruptcy. The jury were entitled to infer that the threat proceeded not from knowledge of facts that would put a prudent man on inquiry, but from a purpose to give the adjuster a weapon with which to intimidate Curtis into making a more satisfactory settlement than he had proposed.

The assertion in the letters written by the adjuster two or three days after the settlement to which we have referred tend to support rather than to contradict the view that the preference was accepted in good faith. It appears that the adjuster was still ignorant of the fact that Curtis owed other wholesale merchants since he only mentions some unpaid local debts of trifling amounts. He does not say, as plaintiff appears to think, that his alleged conversations with Curtis, in which he impugned his honesty, occurred before the preference was given, and if he had, the inference would be reasonable that the imputation referred to the conduct of Curtis in paying his other creditors in full out of the purchase price of the stock and then refusing to make a satisfactory settlement with defendant, his heaviest creditor.

A careful analysis of all the evidence (a more extended review of which would serve no useful purpose) convinces us that the court properly took the view that the case involved issues for the jury to determine. We find no error in the instructions, the case was fairly tried and submitted and the judgment must be affirmed. It is so ordered. All concur.

Digitized by Google

NELLIE G. DAVIS, Respondent, v. ELLIS T. DAVIS, Appellant.

Kansas City Court of Appeals, November 17, 1913.

DIVORCE: Alimony Pendente Lite. The right of a wife to alimony *pendente lite* and suit money is not absolute and will be denied in instances where she had sufficient property in her own right to prosecute or defend the action. But the law still recognizes the right of a wife to receive support from her husband pending the divorce suit where her own means are inadequate to support her in a manner suitable to the means of her husband. It is largely in the discretion of the court whether to allow alimony *pendente lite* in any given case.

Appeal from Buchanan Circuit Court.—*Hon. Chas. H. Mayer,* Judge.

AFFIRMED.

John S. Boyer and *Broaddus & Crow* for appellant.

Mytton & Parkinson for respondent.

JOHNSON, J.—The appeal in this case is prosecuted by defendant from a judgment for temporary alimony and suit money recovered in an action for divorce brought by plaintiff against defendant in the circuit court of Buchanan county. The parties were married in September, 1899, and lived together until September 17, 1912, when they separated. Plaintiff retained the custody of a child born of the marriage who was twelve years old at the time of the separation.

The action for divorce was returnable to the January, 1913, term of the circuit court. Defendant appeared and filed an answer and cross-petition in which he prayed that a divorce be granted him on the ground

Digitized by Google

of the alleged adultery of plaintiff. Before the filing of this pleading defendant served notice on plaintiff to take depositions in Los Angeles, California. Plaintiff thereupon filed a motion for suit money and alimony *pendente lite*. After hearing evidence on the motion the court rendered the following judgment:

"The motion for temporary alimony, suit money and attorneys' fees in this cause coming on to be heard, and the court having heard the evidence and having examined all of the pleadings and being fully advised in the premises, doth find that the plaintiff is possessed of a diamond ring of the value of about two hundred dollars and a ring of the value of about fifteen dollars, and a piano of the value of about one hundred dollars.

The court further finds that the plaintiff's mother died several months prior to this date; that the plaintiff has an interest in the estate left by her mother, which estate consisted of certain real estate in the town of Diagonal in the State of Iowa; that the plaintiff's mother and the plaintiff's father resided on said real estate at the time of the death of the plaintiff's mother; that there is no evidence upon which the court can find the value of said real estate, but the court finds that plaintiff has an undivided one-half interest in said real estate subject to a life interest of plaintiff's father; that her mother's estate is now being probated, the time for final settlement not having arrived; that there is no evidence as to the value of the personal property, if any, left by plaintiff's mother; that plaintiff's grandmother has recently died in the State of Illinois, bequeathing to plaintiff $500; that the will of plaintiff's mother is being contested and plaintiff cannot now obtain said bequest.

The court finds that the infant son of plaintiff and defendant, aged twelve years, is residing with plaintiff.

Digitized by Google

The court doth further find that the defendant has in cash twenty-eight hundred dollars; that he owns real estate of the value of three thousand dollars, and that he is earning as traveling salesman seventy-five dollars per month and his expenses.

The court further finds that the defendant has failed and refused to contribute anything towards the support and maintenance of plaintiff.

The court further finds from representations made to the court by the attorneys of the respective parties on the application of the defendant to shorten time for taking depositions on behalf of defendant in Los Angeles, in the State of California, that it is necessary for the plaintiff to be represented at the taking of said depositions in Los Angeles, and that fifty dollars is a reasonable compensation for the services of an attorney to represent plaintiff in the taking of depositions.

Wherefore it is ordered, adjudged and decreed that the defendant pay to the clerk of the circuit court fifty dollars to be paid to counsel representing plaintiff at the taking of said depositions in Los Angeles; that defendant pay two hundred and fifty dollars to the clerk of said court to be paid to attorneys, Mytton & Parkinson, for the preparation of plaintiff's cause and representing her in said cause in the circuit court of Buchanan county, and that the defendant pay said money on or before the 13th day of January, 1913, and further, that the defendant shall pay to the clerk of this court thirty-five dollars on the 15th day of January, 1913, and on the 15th day of each month thereafter and until the trial of this cause, for the support and maintenance of plaintiff and the minor child of this plaintiff and defendant."

The facts thus found by the court are abundantly supported by evidence. It appears that when the parties separated defendant kept possession of the house they were occupying, the title to which is in his name,

Digitized by Google

and of the household goods and other personal property. He had about $2800 in bank and was and is receiving a salary of seventy-five dollars per month. He gave plaintiff nothing and has since contributed nothing to her support or that of the child, with the exception of some clothing which he has provided for the child. Plaintiff had about ninety dollars in money, some jewelry and a piano. She rented and furnished a small house, exhausted her ready money and is supporting herself and the child by keeping a boarder and doing needlework. It is quite evident that her interest in the estate of her mother and grandmother are in such condition that she cannot resort to them for means to prosecute her suit and to defend herself against the serious charge her husband has made against her in his cross-petition.

While it is true that the right of a wife to alimony *pendente lite* and suit money is no longer absolute in this State and will be denied in instances where she has sufficient property in her own right to prosecute or defend the action (Penningroth v. Penningroth, 71 Mo. App. 438; State ex rel. v. St. Louis Court of Appeals, 99 Mo. 216; Robertson v. Robertson, 137 Mo. App. 93), the law still recognizes the right of a wife to receive support from her husband pending the divorce suit where her own means are inadequate to support her in a manner suitable to the means of her husband.

Plaintiff should not be compelled to sell or pawn her diamond ring or mortgage her piano to obtain for herself and child money to live on and to defray necessary expenses incurred by her in the prosecution and defense of the divorce suit when her husband has money and other property of the value of more than $5,000 and a salary of seventy-five dollars per month. As is well said in Robertson v. Robertson, supra: "All that can be said as to the law in such cases may be resolved into one sentence, viz., that it is largely in the discretion of the court whether to allow alimony

Digitized by Google

pendente lite in any given case. It certainly would be an abuse of discretion for a court to allow a wife such alimony where it is made to appear that she has sufficient means of her own, as the reason for allowing her such support is because she has them not. But it is a question of fact for the court, not to say she has means, but whether they are sufficient for the purpose. . . . each case of this kind must be governed by the circumstances and condition in life of the parties, and what would be a proper allowance in one instance would be unjustifiable and oppressive in another. The true rule is expressed in State ex rel. v. St. Louis Court of Appeals, supra, that the court should allow alimony 'in all cases where the same would be just.' "

We do not think the judgment before us may rightly be called an abuse of sound discretion.

The judgment is affirmed. All concur.

GLOBE & RUTGERS FIRE INSURANCE COMPANY, Appellant, v. CHICAGO & ALTON RAILROAD COMPANY, Respondent.

Kansas City Court of Appeals, November 17, 1913.

1. **FIRE INSURANCE: Damages: Valuation of Property.** The plaintiff, an insurance company, issued a policy of fire insurance to a corporation engaged in mining coal. The policy covered a large number of "company or camp houses" each valued at $240. A passing engine on defendant's railroad set fire to and destroyed ten of these houses and damaged others to the extent of $25. The plaintiff paid the coal company, and received an assignment of its claim against the railroad company. This action is to enforce the claim against the latter. *Held*, that the defendant's liability, either to the coal company or its subrogated insurer, was the actual value of the destroyed and damaged property at the time of the fire.

2. ———: ———: ———: **Statute.** Under Sec. 3151, R. S. 1909, a railroad company by setting out a fire is liable to the owner for the actual damages sustained for all property de-

Digitized by Google

stroyed. But under Sec. 7020, R. S. 1909, the liability of an insurance company, as the insurer of property is not valued by the actual value of the property destroyed by the fire, but by the value stated in the contract of insurance.

3. ———: ———: **Privity of Contract.** While there is not privity of contract between the railroad company and the insurance company, yet the insurer is *practically* the surety for the railroad company, the principal. And wherever the insurer has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable.

4. ———: **Evidence: Similar Property: Aid to Jury.** The evidence of sales of a similar property to that in question, made in the neighborhood, about the same time, was admissible to aid the jury in determining the damages done by the fire to which the owner was entitled.

5. **DEFINITIONS: Reasonable Worth or Value.** "Reasonable worth" or "reasonable value" are terms which have a definite and common meaning to people of ordinary information and understanding, and their use in instructions relating to the issue of the market value of property should not be condemned as reversible error.

6. **MOTIONS: Retaxing of Costs: Statute.** Under Sec. 1965, R. S. 1909, a motion of the defendant to retax costs, being filed at the term the judgment was rendered, was timely and was properly sustained.

Appeal from Randolph Circuit Court.—*Hon. A. H. Waller,* Judge.

AFFIRMED.

Clarence A. Barnes and *Barger & Hicks* for appellant.

Scarritt, Scarritt, Jones & Miller and *W. P. Pinkerton* for respondent.

JOHNSON, J.—In 1910, the plaintiff, an insurance company, issued a policy of fire insurance to a corporation engaged in coal mining in Randolph county. The policy covered a large number of small frame dwelling houses called "company or camp houses"

Digitized by Google

each of which was valued at $240. A fire caused by a passing train on defendant's railroad that ran through the camp totally destroyed ten of these houses and damaged others in the amount of twenty-five dollars. Proofs of loss were duly made by the coal company and plaintiff paid $2425 in discharge of its liability and received an assignment from the coal company of its cause of action against defendant. Plaintiff then commenced the present suit to recover the amount of its loss on the ground, alleged in the petition, "that upon the payment of said sum the said Globe & Rutgers Fire Insurance Company became and was subrogated to all the rights of the said Northern Central Coal Company against the said defendant, the Chicago & Alton Railroad Company for the recovery of the said sum of money, twenty-four hundred and twenty-five dollars, by reason of the destruction of the said property by fire communicated thereto by the locomotive engine in use on the railroad owned and operated by the defendant as aforesaid." The petition alleged that the ten houses destroyed were "of the reasonable cash value of twenty-four hundred dollars." The answer of defendant is a general denial.

The evidence shows conclusively that the fire which caused the loss originated from a passing locomotive on defendant's road and the only dispute between the parties relates to the measure of plaintiff's right of recovery. Defendant contends that the value of the houses at the time of the fire was the measure of damages and before the trial served on plaintiff an offer of judgment in writing in which it agreed that judgment might be rendered against it in the sum of four hundred dollars and the accrued costs. This offer was refused and at the trial defendant was allowed to introduce evidence tending to show that the houses were old, rotten, abandoned as dwelling places and that the coal company had been selling them for thirty-five dollars each, which was their reasonable value at

Digitized by Google

the time of the fire. The court refused the request of plaintiff for an instruction fixing the measure of damages at the amount of plaintiff's liability under the policy and instructed the jury that they "cannot allow plaintiff more than the reasonable value of each house, or houses, burned at the time and place of the fire."

Thus instructed the jury returned a verdict for plaintiff for $375. Five days after the verdict and at the same term of court defendant filed a motion "to tax the costs of this suit incurred since the tender herein against the plaintiff." This motion was sustained, plaintiff excepted and duly preserved its exception. After unsuccessfully moving for a new trial, plaintiff brought the case here by appeal.

First we shall dispose of the contention of plaintiff that the rulings of the court upon the instructions relating to the measure of damages were erroneous and prejudicial to the legal rights of plaintiff.

In setting out the fire which destroyed property of the coal company, defendant, under the provisions of section 3151, Revised Statutes 1909, became liable to the owner of the property for the actual damage sustained. The liability of the plaintiff, as the insurer of the property, was not measured by the actual value of the property destroyed by the fire, but by the value stated in the contract of insurance (sec. 7020, R. S. 1909.) If defendant's evidence relating to the actual value of the property is correct, plaintiff agreed in the policy to pay an indemnity far in excess of that value and under the statute just cited became bound by the contract of insurance to sustain a loss greatly exceeding that incurred by the insured in consequence of defendant's tort. But defendant was neither a party nor a privy to that contract (Matthews v. Railway, 142 Mo. 645; Hartford Fire Ins. Co. v. Railway, 74 Mo. App. 106) and its liability as a tort-feasor cannot be expanded by the terms of a contract to

Digitized by Google

which it was a complete stranger. The only cause of action plaintiff could have against defendant, either by operation of law or under the assignment it obtained from the coal company is the cause that the tort of defendant conferred upon the latter company. By paying the indemnity provided in the policy plaintiff became subrogated to the rights and remedies of the coal company against defendant—to no more and no less. It stepped into the shoes of the coal company and is no more entitled to add to rights thus obtained, the loss it sustained in consequence of an improvident contract than the coal company would have been entitled to magnify its demand against defendant by the value placed on the property in the insurance contract.

We repeat with approval the following excerpt from the opinion in Insurance Company v. Railway, 74 Mo. App. l. c. 112; "The insurance company had no connection in any manner with any act which caused the loss. Such company's only connection with the loss is its contract to recompense Burruss whenever the loss should occur. If therefore the insurance company has been compelled to pay Burruss for a loss occasioned by the railroad company, it should, in justice and equity, succeed to whatever liability existed in Burruss's favor against the railroad for such act. While there is no privity of contract between the railroad company and the insurance company, yet it has been held on the highest and most satisfactory authority that the insurer is *practically* the surety for the railroad company, the principal. And whenever the insurer has 'indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principals of equity. It is the doctrine of subrogation, dependant, not at all upon privity of contract, but worked out through the right of the creditor or owner.'

Digitized by Google

[Hall v. Railroad, 13 Wall. 367; L. & G. W. Co. v. Ins. Co., 129 U. S. 397, 462; The Potomac, 105 U. S. 630; R. R. v. Rogers, 76 Va. 443; Hart v. R. R., 13 Met. 99.]"

The measure of defendant's liability, either to the coal company or its subrogated insurer, was the actual value of the destroyed and damaged property at the time of the fire.

It is argued by plaintiff that the court erred in receiving evidence of sales made by the coal company of houses in the camp similar to those destroyed. The evidence was clearly admissible under the rulings of the Supreme Court in Railway v. Clark, 121 Mo. l. c. 185; Markowitz v. Kansas City, 125 Mo. l. c. 490; Matter of Forsyth Blvd., 127 Mo. 417. It is said in the Clark case: "We think the evidence of sales of similar property to that in question, made in the neighborhood, about the same time, was admissible to aid the jury in determining the damage to which the owner was entitled. The value of property is ascertained largely from such sales, and the opinion of witnesses as to values are largely predicated upon them. It is best, when it can be done, to put the jurors in possession of all the facts from which values are ascertained, and allow them to draw the conclusion therefrom. Witnesses basing their opinions upon recent sales, of like property, are liable to exaggerate or underestimate values; in any consideration they are no more capable of deducing fair conclusions from the known facts than the jury . The object is to ascertain the general market value, and if particular sales are made under exceptional circumstances the fact can be shown, and the jury can determine its probative force."

It is possible, as suggested by plaintiff, that the coal company put the houses on the market for sale at a price less than their actual value but the fact that the company priced and sold the houses at thirty-five dol-

Digitized by Google

lars each is very persuasive evidence that they possessed no greater value.

Plaintiff complains of the use of the term "reasonable value" in the instructions and cites us to a judicial utterance to the effect that an attempt to give a specific meaning to the word "reasonable" is "trying to count what is not number and measure what is not space." [Altschuler v. Coburn, 38 Neb. l. c. 890.]

This is more epigrammatic than sound or practical. A term that has the sanction of universal common usage and has a well-defined and settled meaning to the common understanding should not be too critically analyzed and condemned nor given a technical meaning when used in judicial proceedings. "Reasonable worth" or "reasonable value" are terms which have a definite and common meaning to people of ordinary information and understanding and their use in instructions relating to the issue of the market value of property should not be condemned as reversible error. [Matthews v. Railway, 142 Mo. l. c. 655; Land Co. v. Railroad, 123 Mo. App. l. c. 408.]

In the Matthews case, it is said in a syllabus that "in such an action the measure of damages is the reasonable worth of the barn and its contents at the time of the fire." We have noted the allegation of plaintiff in the petition that the "reasonable cash value" of the property was twenty-four hundred dollars. Where experts as well as laymen use the term in the same sense and to convey the same thought, it is impossible to think the jury could have been misled by it.

In his opening statement to the jury counsel for defendant said: "There is something awfully strange took place in this case, there is a nigger in the woodpile some place and just who put the nigger there, I don't know." Counsel for plaintiff objected and then immediately added, "If the court please, I don't know whether those matters are proper matters in the opening statement or not, they savor of argument, but if

Digitized by Google

Mr. Miller produces such facts, we have no objection, there will be no injury, I guess."

The evidence shows that the coal company had its main office in New York, that the policy was procured there and that the loss was settled in that city according to the terms of the policy and without objection or delay on the part of plaintiff.

In the closing argument counsel for defendant again remarked that "there was a nigger in the woodpile" and explained what he meant by that homely colloquialism by asserting, in substance, that the gross over insurance of the property and the amount and the prompt and apparently amicable settlement of the loss must have been due to some close relationship between the executive officers of plaintiff and the coal company. Though no issue of fraudulent over-insurance was raised by the pleadings, we think the argument was fairly within the scope of the contested issues. Plaintiff was contending that it insured the houses at their reasonable value while the evidence of defendant strongly tended to show that the property was insured at seven times its real value under circumstances indicating, at least, a lack of business judgment or diligence on the part of the insurance company. On the hypothesis that the houses were worth only thirty-five dollars each, it is difficult, under all of the facts and circumstances in evidence to account for the conduct of the plaintiff in issuing a policy on such a gross overvaluation without ascribing to its officers negligence amounting to recklessness, or some ulterior motive not disclosed on the face of the transaction, but fairly inferable from all its facts and circumstances. Defendant had the right to give to the jury its views, based on evidence, of the reason for the great disparity between the two valuations. The argument was legitimate and the objection to the closing argument was not well taken.

Digitized by Google

The motion of defendant to retax the costs being filed at the term the judgment was rendered was timely and was properly sustained. [Sec. 1965, R. S. 1909.]

Finding no reversible error in the case the judgment is affirmed. All concur.

WILLIAM N. GREGORY, Respondent, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, November 17, 1913.

1. **CARRIERS OF LIVE STOCK: Damages: Delayed Shipment.** The plaintiff sued to recover damages from the defendant for a delayed shipment of fat cattle from Rosendale to Chicago. The cattle were unloaded, fed and watered at Galesburg, and were delayed at Mendota on account of a wreck, finally arriving in Chicago too late for that day's market. *Held*, that the unusual delay in transportation was not caused by the defendant's negligence.

2. ———: ———: ———: **Inference of Negligence.** Mere proof of an unusual delay in the transportation of property by a common carrier will not support an inference that such delay was due to the negligence of the carrier, but since the means of showing how such delay occurred is with the carrier and not the shipper, it would be "enough for the plaintiff to disclose circumstances sufficient to raise a fair inference of negligence."

3. ———: ———: ———: **Evidence.** In order to raise an inference of negligence there must be some evidence of negligence and the burden of proving that fact is on the plaintiff who asserts a right to receive damages on the ground that he was damaged by such negligence.

4. ———: **Negligence: Damages.** A carrier is not liable in an action for damages for accidental or unavoidable delays but only for those caused by its negligence.

Appeal from Andrew Circuit Court.—*Hon. A. D. Burnes*, Judge.

REVERSED.

Digitized by Google

W. D. Eaton and *Booher & Williams* for appellant.

(1) Negligence is a positive wrong and must be proven. Cunningham v. Railroad, 167 Mo. App. 273; Lay v. Railroad, 157 Mo. App. 468, 138 S. W. 884; Decker v. Railway Co., 149 Mo. App. 534. (2) Mere delay in shipment does not establish negligence. McDowell v. Railroad, 167 Mo. App. 273; Lay v. Railroad, 157 Mo. App. 468, 138 S. W. 884; Decker v. Railway Co., 149 Mo. App. 534; Clark v. Railroad Co., 138 Mo. App. 424; Eaton v. Railroad Co., 125 Mo. App. 223; Otrich v. Railroad Co., 154 Mo. App. 420. (3) The court should have instructed the jury to find for defendant. Clark v. Railroad, 138 Mo. App. 424; Eton v. Railroad, 125 Mo. App. 223; Witting v. Railroad, 101 Mo. 631.

Stephen Fee and *P. C. Breit* for respondent.

(1) Negligence is the want of care and diligence. (2) Mere delay in shipment does not establish negligence yet where the fact of delay is supplemented by evidence of the cause, it may show that it was negligence. Wright v. Railroad, 118 Mo. App. 392; Bushnell v. Railroad, 118 Mo. App. 618; Lay v. Railroad, 157 Mo. App. 468; Muir v. Railroad, 168 Mo. App. 542. (3) Negligence may be inferred from circumstances. Muir v. Railroad, 168 Mo. App. 542; Bushnell v. Railroad, 118 Mo. App. 618; Gilbert v. Railroad, 132 Mo. App. 697; Decker v. Railroad, 149 Mo. App. 534; Anderson v. Railroad, 93 Mo. App. 677.

JOHNSON, J.—Suit against a common carrier to recover damages caused by negligent delay in the transportation of twenty head of fat cattle from Rosendale, Missouri, to the stockyards at Chicago. Plaintiff prevailed in the circuit court and the cause is here on the appeal of defendant. The principal

Digitized by Google

question for our determination is whether or not the evidence of plaintiff will support the finding of the jury expressed in their verdict that defendant negligently failed to carry the cattle to their destination within a reasonable time.

The shipment left Rosendale about nine o'clock a. m. on Tuesday, September 19, 1911, on a local freight train, and did not reach the stockyards at Chicago until the following Thursday at 1:50 o'clock p. m., too late for that day's market. Plaintiff, who has had years of experience in shipping cattle from Rosendale to Chicago over defendant's line, testified that the usual time consumed in such shipments where, as in this instance, the cattle were unloaded at Galesburg for food, water and rest, is forty-four hours and therefore that a shipment of cattle leaving Rosendale at nine o'clock Tuesday morning should arrive in Chicago at the stockyards before six o'clock Thursday morning in ample time for that day's market. According to this testimony which in the consideration of the question before us we must accept as true, there was an unusual delay of eight or nine hours in the transportation.

The gist of the action is negligence and it has been held repeatedly by courts of last resort in this State that mere proof of an unusual delay in the transportation of property by a common carrier will not support an inference that such delay was due to negligence of the carrier, but that since the means of showing how such delay occurred is with the carrier and not the shipper, it would be "enough for the plaintiff to disclose circumstances sufficient to raise a fair inference of negligence." [Anderson v. Railroad, 93 Mo. App. 677; Bushnell v. Railroad, 118 Mo. App. 618; Gilbert v. Railroad, 132 Mo. App. 697; Decker v. Railroad, 149 Mo. App. 534; Muir v. Railroad, 168 Mo. App. 542; Wright v. Railroad, 118 Mo. App. 392; Lay v. Railroad, 157 Mo. App. 467.] As we observed in the Bush-

Digitized by Google

nell case, "circumstances that even slightly tend to show a negligent origin of the unusual delay will support an inference of negligence." But all of the cases recognize and emphasize the rule that there must be some evidence of negligence and that the burden of proving that fact is on the plaintiff who asserts a right to recover damages on the ground that he was damaged by such negligence.

The car of cattle remained in the local freight train until it reached Creston, Iowa, which was the end of the run of that train. The car was put in the first regular stock train going east from Creston and left that place on time. There is some evidence of unnecessary delays in the operation of the local freight train after it left Rosendale but this evidence, obviously, is immaterial since the fact is undisputed that the cattle went out of Creston on time and on the train that would have carried them had the local freight train arrived at Creston on schedule time.

The train that carried the shipment from Galesburg into Chicago did not leave on schedule time but the evidence does not show how late it was. Counsel for plaintiff say in their brief "the fact that appellant was late with its train out of Galesburg is sufficient to raise the inference of negligence and especially is this true where, as in this case, the means of showing why it was late was with the appellant." But this argument seems to ignore the rule that mere delay, of itself, will not support an inference of negligence. There is nothing in the evidence that even tends to show any negligent delay in the run from Creston to Galesburg. The transportation had already covered a distance of, perhaps, 325 miles and the cattle had been unloaded at Galesburg, put in stock pens, kept there at least five hours, and then reloaded. It would be more reasonable to suppose, in the absence of proof to the contrary, that the delay in leaving Galesburg under all the circumstances disclosed was due to accidental or unavoid-

Digitized by Google

able causes rather than to negligence. A delay of about four hours occurred at Mendota, which is about eighty miles from Galesburg. Defendant's road crosses another railroad at that place and the crossing became blocked by a wreck that occurred on the other road. The wreck was caused by the parting of a train and could not have been due to any negligence of defendant.

Plaintiff seeks to hold defendant responsible for that delay on several grounds. First, because the evidence shows that had the train left Galesburg on time and proceeded without delay it would have been seven miles beyond, instead of nine miles short of Mendota, when the wreck occurred. We have sufficiently answered this argument by referring to the lack of proof tending to show that the delay in leaving Galesburg was negligent. Next, plaintiff invokes the rule applied in the cases of McFall v. Railroad, 117 Mo. App. 477; Vencill v. Railroad, 132 Mo. App. 722; Thompson v. Railroad, 136 Mo. App. 407, to the effect that the burden is on the carrier to show that a wreck on its line that caused a delay in the transportation of property was not due to its own negligence.

But that rule cannot aid plaintiff since it clearly appears that the cause of the blockade was one which was entirely beyond the power of defendant to prevent. As we have already said defendant cannot be held liable in this action for accidental or unavoidable delays but only for those caused by its negligence and, lastly, it is urged that since defendant's track was cleared in two hours and seven minutes after the wreck occurred it was negligence to hold the train for more than an hour longer.

The conductor testified that the train proceeded on its way as soon as the train dispatcher issued the order for it to go on. We must assume (there being no proof to the contrary) that the dispatcher acted with care and reasonable diligence in giving order to move trains

Digitized by Google

that had gathered at the crossing during its blockade. To allow the jury to return a verdict against defendant on the finding that the dispatcher should have issued this particular order earlier would be to allow them to indulge in mere guesswork and speculation.

Moreover if the order had been issued as soon as the blockade was lifted the cattle would not have reached the stockyards in time for that day's market which was over at noon.

We have examined the record carefully and find no evidence that the unusual delay in the transportation was caused by negligence. The jury should have been instructed to return a verdict for defendant. The judgment is reversed. All concur.

OIL WELL SUPPLY COMPANY, Appellant, v. E. M. METCALF et al., Respondents.

Kansas City Court of Appeals, November 17, 1913.

1. **NEW TRIAL: Evidence.** When a new trial is granted and the party obtaining the verdict appeals, an appellate court will take the facts to be what the evidence in favor of such party tends to show them.

2. **PARTNERSHIP: Evidence.** Evidence that the parties charged as partners went to the plaintiff's place of business and stated that they were intending to organize a corporation, but until they did so, they would act as partners, and that one of their number would be their field manager and would purchase supplies of plaintiff; it was held, that this was evidence to justify a verdict that they were partners and were liable for supplies afterwards purchased.

3. **AGENCY: Evidence: Declarations.** One's declarations without more, that he is an agent for others is not competent against such others. But if the agency is established prima facie, by other testimony, then his declarations are admissible, and he is a competent witness in establishing a prima facie agency.

Digitized by Google

4. **PARTNERSHIP: Holding Out.** A partnership may be shown to exist in fact, or by a holding out as such and either instance will suffice to hold it liable for obligations incurred.

5. **———: Fraud of One Partner.** Evidence that one of several partners induced them to enter the partnership by fraudulent misrepresentations is not admissible against a claim for goods purchased by such partner of one who did not know of the fraud.

6. **PLEADING: Partnership: Individual's Action.** A person having a demand against a partnership may, under the statute, sue any or all of the partners, and aver in his petition that the contract is that of the defendants and to prove this averment he may prove the contract was made for the partners through an agent, and that agent may be one of the partners.

7. **———: Prima Facie Case: Declarations: Witness.** After evidence has been given establishing, prima facie, that a partnership exist, the declarations and admissions of one of the alleged partners is proper evidence; and such partner is a competent witness.

8. **———.** A partnership bought goods of another through one of its members, and informed the seller that bills should be sent to the purchasing partner which he would approve and forward to the other partners who would pay the amount; it was held that this was not evidence that it was necessary that the seller must procure such approval before he had a right of action. It was merely a statement of a mode of payment.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas,* Judge.

REVERSED AND REMANDED (*with directions*).

Frank Hagerman, E. E. Ball and *Clyde Taylor* for appellant.

Metcalf, Brady & Sherman and *James H. Austin* for respondents.

ELLISON, P. J.—Plaintiff's action is on an account for goods, wares and merchandise sold to defendants. The verdict in the circuit court was for plaintiff; but afterwards that court sustained a mo-

Digitized by Google

tion for new trial on the ground of error in "giving improper instructions on behalf of plaintiff, and for failure to give proper instructions in behalf of defendants." Plaintiff thereupon appealed and seeks to have the verdict reinstated and judgment rendered thereon.

Preliminary to consideration of the case we will say that in stating the facts we will confine ourselves to what the evidence in plaintiff's behalf tends to prove them to be. We make this observation for the reason that defendants have made a lengthy statement of facts as the evidence in their behalf tended to prove them, without reference to the evidence in plaintiff's behalf.

One Ross had what is known as an oil lease on lands in Kansas and sought to develop it (in addition to what had already been done) by sinking oil wells and doing such other things as would bring it into profitable use. He came to Kansas City, Missouri, and interested the defendants in the project by selling them each an interest. They including Ross, were to form a corporation to be known as "The Happy Holler Oil and Gas Company," but in the meantime they were to proceed as partners; or, at least, they held themselves out to plaintiff as partners. They needed metal casings and joints and they went to plaintiff's establishment, where such articles were kept for sale and stated to the general manager that they would want to purchase supplies, that they intended to organize a corporation, but until they did they would be partners. They made arrangements with him to furnish supplies which they said would be bought by Ross whom they said was their field manager. That the bills should be sent him for articles purchased, which he would approve and send to defendants in Kansas City who would pay them. Afterwards they directed Ross to contract for the drilling of wells and supplies there-

Digitized by Google

for, who, in compliance therewith ordered the supplies making up the account in suit, and these were delivered by plaintiff. They were afterwards taken on an attachment writ for labor in drilling wells. There were seven of those parties but as service was had only on these four against whom the verdict was rendered we will consider them as the defendants, and they are the ones (Metcalf representing himself and Brady) who made the representations and arrangements above stated.

Undoubtedly the foregoing facts, if believed by a jury, are ample to sustain plaintiff's case; and we therefore turn attention to the action of the court during the progress of the trial to see if any thing transpired to justify it in setting aside the verdict.

It is asserted that Ross was not a competent witness to prove his own agency. That is an erroneous idea. One's agency cannot be shown, at second hand, by proving declarations he has been heard to make; but that he may testify to his own agency is no where questioned. [City v. Fisher, 60 Mo. App. 511; Christian v. Smith, 85 Mo. App. 117; Griswold v. Haas, 145 Mo. App. 578.]

And, as we shall see further on, the same may be said to the objection that Ross was not a competent witness to prove the partnership as against the other alleged partners.

We cannot understand the applicability of defendant's contention that the holding out of a partnership, when in fact there was none, will not avail a person seeking to charge such partnership unless he had knowledge of the holding out. The proof was abundant that the holding out was made directly to plaintiff's general manager. The statements made by defendants to the general manager as to there being a partnership, if true, established a partnership in fact. If they were not true, it established a partnership by a holding out as such. Either view will suffice to hold defendants.

Digitized by Google

Defendants contend that Ross inveigled them into the purchase of an interest in his lease by fraudulent misrepresentations and that the court erred in instructing the jury that that fact could not affect the plaintiff's right to recover. Manifestly the instruction was correct. The troubles between Ross and these defendants do not concern the plaintiff and Ross' misconduct (if any) should not be visited upon it.

Plaintiff's instruction number 3, omits any reference as to whether there was a partnership between defendants and Ross, but submits that if defendants told plaintiff's manager that Ross would represent them in purchasing articles and that Ross made such purchases, the verdict should be against those who made such statements to the manager. It is said that the petition only declares on a purchase by a partner for a partnership, whereas the instruction authorizes a recovery if the purchase was made by Ross as agent for individuals. The instruction was proper under our statute as it has been all along interpreted. In Gates v. Watson, 54 Mo. 585, it was said that "At common law, when part only of the members of a partnership were sued on a partnership contract, the partner sued might plead a nonjoinder of the other parties in abatement. But our statute makes all such contracts joint and several and a person having a demand against a partnership under our statute may sue any partner or all of the partners at his election. In such case he may aver that the contract sued on is the contract of the defendants; and to prove this averment, he may show that the contract was made by the parties sued through an agent authorized to make it for defendants; or, what is the same thing, he may show that the defendants and another were partners, and the contract was made by such partner for the benefit of the firm in the usual course of business." To the same effect is Crews v. Lackland, 67 Mo. 619.

Digitized by Google

It also is insisted that the defendants were prejudiced by the court's action in modifying one of their instructions so as to cut out a broad and express direction to the jury that *no* declaration or act of Ross as to the existence of a partnership should be considered unless such act or declaration was with the knowledge and consent of the other alleged partners. No error was committed in striking that out. It is true you cannot prove that a partnership existed by the acts and declarations of the alleged partner. But if you first, make out a prima facie case, as was done here, that a partnership exists it is then proper, in corroboration, to show that he acted as such and stated that he was. As already seen this is the rule as to agency. [Peck v. Ritchey, 66 Mo. 114; State ex rel. v. Henderson, 86 Mo. App. 482; Worth v. Ollis, 61 Mo. App. 401.] And the rule that the act of one partner binds the other springs from agency; and the rule governing the latter class, ought in this respect, to apply to partners; and so it is held to be the law in partnership cases. [Campbell v. Dent, 54 Mo. 325, 331; Clark v. Huffaker, 26 Mo. 264; Bank v. Outhwaite, 50 Mo. App. 130; Conlan v. Meade, 172 Ill. 13, 17; Alcott v. Strong, 9 Cush. 323, 328; Phillips v. Parrington, 15 Maine, 425.]

The further point is made that under the evidence the account for supplies, under the directions given plaintiffs, must have been approved by Ross before it became a debt of the defendants. This is not a proper interpretation of the evidence. The accounts were to be sent to Ross, evidently for his approval since he was personally to make the purchases. The evidence does not show that his approval was a requisite to the existence of a valid claim of indebtedness against the defendants. It was a matter between Ross and the defendants and afforded the latter the means of knowing when to make payments. Certainly goods should not be confiscated by a partnership because one of the

Digitized by Google

partners who made the purchase failed to certify, for the convenience of his copartners in paying his and their debt, that the account was correct.

There were some other suggestions in behalf of defendants, but we think nothing to justify a new trial. The judgment will therefore be reversed and the cause remanded with directions to enter judgment on the verdict. All concur.

AMANDA CROWLEY, Respondent, v. LUTHER A. DAGLEY, Administrator of the Estate of EMELINE P. ASBURY, Deceased, Appellant.

Kansas City Court of Appeals, October 6, 1913.

1. **EXECUTORS AND ADMINISTRATORS: Claim for Personal Services.** The plaintiff sued the administrator of her deceased mother to recover compensation for personal services rendered during the latter part of her mother's life. The mother repeatedly stated that she wanted the plaintiff paid well for taking care of her and that she wanted her sister and aunt to have what was left. *Held*, that plaintiff failed to sustain her burden of proof and that the demurrer to the evidence should have been sustained.

2. ———: ———: **Presumption.** Where personal services are rendered to an aged and partially helpless person by an adult child, the ordinary presumption that such services are to be paid for, which would arise were they performed by a stranger, does not obtain and the opposite presumption must be indulged that although the child was not legally bound to serve the parent gratuitously, the impelling motive was filial love or the dictates of humanity, rather than the expectation of pecuniary reward.

Appeal from Clay Circuit Court.—*Hon. Francis H. Trimble,* Judge.

REVERSED.

R. T. Stephens and *E. L. Riley* for appellant.

Martin E. Lawson for respondent.

Digitized by Google

JOHNSON, J.—This suit originated in the probate court of Clay county on a demand filed by plaintiff against the estate of her deceased mother. The only item before us for consideration is the following:

"To personal services rendered said Emiline P. Asbury from August 8, 1910, to February 29, 1912, boarding her, furnishing rooms, washing her clothes and bedding, waiting on deceased, who during all that time was sick and often helpless, changing her clothing, watching her by day and by night, especially during the last three months of said time when the mind of deceased was affected and she needed constant care and attention, 80 5-7 weeks at $15 . . . $1210.70. . . . For said attention the deceased agreed to pay and especially proimsed to pay for the care, attention and so forth first above stated."

The issues were tried in the probate court and afterwards in the circuit court where the cause was taken by appeal. At the latter trial the jury returned a verdict for plaintiff in the sum of $1000, and after unsuccessfully moving for a new trial and in arrest of judgment, defendant, administrator, appealed.

The principal contention of counsel for defendant is that the verdict and judgment are unsupported by substantial evidence and that the court erred in not sustaining a demurrer to the evidence. On the other hand counsel for plaintiff argue that the evidence discloses the existence of an implied agreement of the decedent to pay for the services in controversy.

The facts of the case as shown by the evidence of plaintiff thus may be stated. Mrs. Asbury, the mother of plaintiff, was eighty-two years old at the time of her death which occurred in Excelsior Springs, February 29, 1912. Her husband had died two or three years before the commencement of the services in dispute and she had been living alone at their old home in Kearney. Plaintiff, a married woman, lived with her

Digitized by Google

family on a farm near Kearney. Sometime before August 8, 1910, she went to live with her mother who had fallen into ill health and could no longer live alone. On the date just mentioned, plaintiff removed with her family and mother to Excelsior Springs chiefly for the benefit of the health of the mother. They lived in a rented house for a time but two or three months before her mother's death plaintiff's husband bought a residence for the family. During the time they occupied a rented house Mrs. Asbury paid half of the rent but paid nothing for her maintenance and the care and attention bestowed upon her by plaintiff. She was afflicted with a disease of the heart which subjected her to fainting attacks and on that account and because of her increasing feebleness required constant care and attention. Plaintiff, herself in poor health, faithfully discharged the duties of a nurse and affectionate daughter during the period for which she seeks compensation. The witnesses do not agree about the degree of the aged women's incapacity to take care of herself but the evidence as a whole clearly shows that she was feeble, childish and afflicted with severe attacks of some form of heart disease. That her condition required, and she received at her daughter's hands, the greatest care and attention are facts about which there can be no reasonable dispute. One day while moving about in the house she accidentally fell to the floor and broke one of her legs, from the effects of which she died the next day.

A great granddaughter of Mrs. Asbury who was a member of plaintiff's family testified: "Q. Miss Thelma, did your grandma ever say anything to you about the care that Mrs. Crowley was giving her? A. Yes, sir. Q. What did she say about it? A. Well, she said that she wanted Aunt Amanda paid for taking care of her, that she wanted Mandy and Aunt Ida to have what she left. Q. Ida is her sister, Mrs. Mullen? A. Yes, sir. Q. How many times did she

Digitized by Google

say anything of that sort to you? A. Oh, she said it several times. Q. What did she say about the kind of care Mrs. Crowley was giving? A. She thought Aunt Amanda was giving her good care. Q. When did she say these things to you? A. She talked to me of night when we would go to bed when she couldn't sleep, lie there and talk to me. Q. Was it at those times when she said those things about paying her well for it? A. Yes, sir."

The wife of Mrs. Asbury's physician, who was on intimate terms with the family, testified: "Q. What was her physical condition, Mrs. Clark? A. Well, she seemed feeble, I think weak. Q. Who was waiting on her and caring for her when you were there? A. Mrs. Crowley would always be looking after her when I would be there. Q. Did Mrs. Asbury say anything to you about the care that Mrs. Crowley was giving her? A. She said Mrs. Crowley was so good to her and she wanted her well paid for what she had done. Q. Did she say that to you more than once? A. Yes, yes, when she would be talking it would be mentioned. Q. What care and attention did you see Mrs. Crowley giving her at different times? A. I would see her give her a drink and see her comb her hair, seen her take hold of her when she would go to walk across the room."

This is all the evidence introduced by plaintiff bearing on the subject of the nature of the relation between her and her mother. Mrs. Asbury had about $2600 in money which, during the period under consideration, was held by a trustee for her benefit. The record does not disclose that she owned any other property at the time of her death. Defendant introduced evidence tending to show that plaintiff rendered the services in question gratuitously, but it is not necessary to go into that evidence since our consideration of the questions arising from the insistence of defendant that plaintiff failed to make out a case to go to

Digitized by Google

the jury must be confined to evidence most favorable to plaintiff.

Where personal services are rendered to an aged and partially helpless person by an adult child, the ordinary presumption that such services are to be paid for which would arise, were they performed by a stranfer, does not obtain and the opposite presumption must be indulged that although the child was not legally bound to serve the parent gratuitously, the impelling motive was filial love or the dictates of humanity, rather than the expectation of pecuniary reward. In this rule the law wisely recognizes the existence of a natural and common human impulse, but this presumption may be overcome by proof that the parties themselves expressly or impliedly agreed before or during the performance of the services that they were not to be gratuitously performed but were to be compensated. The law will give effect to the mutual intention of the parties whether or not it be expressed in a formal contract and where it is made to appear that the recipient of the services intended to pay and the servant expected to receive compensation for them, such intention will be enforced however informal its expression may have been. The decisions in this State, however, draw a vital distinction between mere expressions of gratitude by the recipient and of a voluntary purpose to reward his benefactor at some future time and an express or implied agreement imposing a contractual obligation upon him to pay for the services. The foundation of a legal demand must be an obligation of the latter character and mere expressions of gratitude or of the voluntary intention to reward alone will not constitute a contractual obligation. As is well said by ELLISON, J., in Brand v. Ray, 156 Mo. App. l. c. 630: "The expression of an intention to bestow a bounty and the expectation to receive a bounty will not suffice; an expectation to be made a beneficiary in a will is not sufficient. There must be an under-

Digitized by Google

standing of a debtor and creditor relation, capable of enforcement in law. There must be brought into existence a legal obligation." [See, also, Brock v. Cox, 38 Mo. App. 40; Woods v. Land, 30 Mo. App. 176; Lawrence v. Bailey, 84 Mo. App. 107; Penter v. Roberts, 51 Mo. App. 222.]

The burden is on the plaintiff to show affirmatively the existence of a contractual understanding between her and her mother. Being disqualified as a witness in her own behalf plaintiff is not required to establish this fact by direct and positive evidence but in the absence of such evidence must produce proof of facts and circumstances which if accepted by the triers of fact would overthrow the presumption that the services were gratuitous and raise a reasonable inference that the parties intended they should be regarded as the subject of a contractual rather than of a family relationship.

As is said by the Supreme Court of Utah in Mathias v. Tingey, 38 L. R. A. (M. S.) 750, "If from all the facts and circumstances surrounding the parties and under which the services were commenced and rendered, it can be reasonably inferred that the child expected to receive remuneration and the parent intended to pay, for the services, a promise to pay therefor may be implied." And further it is said in the same case that "if an adult child is no longer a member of the parent's family, but is supporting himself through his own efforts, and the parent under such circumstances requests the child to return to the parent and perform certain services for him, then the general presumption that the services are rendered gratuitously or as a matter of filial duty loses its full force and effect."

But where the facts and circumstances, adduced by plaintiff are found on analysis to be just as consistent with the initial presumption of gratuitous service as with the opposite inference, there can be no

Digitized by Google

issue to send to the jury, since the burden resting on plaintiff compels her to overthrow this presumption by proof before she can be entitled to recover.

The peculiar facts of the present case do not warrant us in holding that the sacrifices made by plaintiff for her mother's sake even tend to show that she was actuated by any other motive than that of filial love and reverence for her aged parent who was helplessly tottering on the verge of the grave. True her mother was able to pay for the services but she was in a condition that enabled her, if she chose, to satisfy the promptings of affection and it would overtax credulity to believe that this well-to-do farmer and his wife left the farm they owned, broke up their home and incurred the expense and inconvenience thereby entailed, from any motive of enabling the wife to earn the wages of a nonprofessional nurse. We are persuaded that the evidence of the sacrifices made by plaintiff for her mother is as consistent with the inference of gratuitous service as with the opposite inference and, therefore, of itself, is insufficient to raise a jury question.

We think plaintiff's case is not greatly aided by the testimony of the great granddaughter and the physician's wife. The declaration of Mrs. Asbury that "she wanted Aunt Amanda paid for taking care of her, that she wanted Mandy and Ida (another daughter) to have what she left," amounts to nothing more than an expression of gratitude, coupled with a voluntary purpose, never carried into execution to make a testamentary disposition of her property in favor of those two children. It must be borne in mind that the burden of plaintiff requires her to show the existence of a mutual intention that the services were to be paid for and we fail to perceive any good ground on which it may be said that a declaration of the recipient of the services of her intention to bestow a bounty in her will on her benefactor can support an inference

Digitized by Google

of the existence of a debtor and creditor relation between the parties. In our opinion it tends rather to contradict than to support such conclusion.

Counsel for plaintiff have not referred us to any case that goes the length we would have to go should we affirm the judgment. In the Utah case from which we have quoted the recipient of the services declared to witnesses her present intention to pay, in language which implied a present legal obligation. In Markey v. Brewster, 70 N. Y. 607, 10 Hun, 16, the deceased was shown to have declared repeatedly that she intended to pay the plaintiff and the court found that "there is nothing in the evidence tending to show that such compensation was to be made by will." In Lillard v. Wilson, 178 Mo. 145, the recipient expressed a present intention to pay and requested his physician to procure a notary to draw up the necessary papers.

In all of the cases in this State relied on by plaintiff (e. g., Cole v. Fitzgerald, 132 Mo. App. 17; McMorrow v. Dowell, 116 Mo. App. 289; Fry v. Fry, 119 Mo. App. 476; Cowell v. Roberts, 79 Mo. 218), there was proof indicating the existence of a present understanding between the parties that the services were to be compensated as distinguished from mere declaration of a voluntary purpose of the deceased to bestow a bounty upon his benefactor.

Our conclusion is that plaintiff failed to sustain her burden of proof and that the demurrer to the evidence should have been sustained. The judgment is reversed.

Ellison, P. J., concurs; *Trimble, J.*, not sitting, having presided at the trial in the circuit court.

Digitized by Google

KATHERINE SHULL, Respondent, v. CLAUDE E. CUMMINGS, Appellant.

Kansas City Court of Appeals, November 3, 1913.

1. **PARTITION: Deed Inter Partes: Husband and Wife: Title.** Where two heirs own inherited land as tenants in common and they partition it by making deeds to each other of the parts agreed upon, one of them making his deed to the other and her husband, the latter does not get any title. The deed only conveys what was already the wife's and it only operates to set off the boundaries to her.

2. **———: Occupancy: Notice: Substituted Plaintiff.** If one has notice of a tenant's occupancy at the time of his purchase of land, he is chargeable with notice of the tenant's rights. And if he seeks to oust the tenant by ejectment, and dies after action brought and his heir is substituted as plaintiff in his place and she carries on the suit, she stands in his shoes and is chargeable with the same notice.

3. **HUSBAND AND WIFE: Separate Property: Consent: Divorce.** Though in order to be effectual under the statute, a wife's consent to her husband's leasing her land and collecting the rent must be in writing, yet she may, after divorce from him, be bound by her acts of recognition of the lease and the tenant.

4. **TENANT: Notice to Quit.** A tenant at will is entitled to thirty days' notice to quit, and if it is not given he may successfully defend a possessory action for the premises.

5. **———: ———: ———: Pleading: Landlord's Title.** Where a petition by a landlord does not set up a claim of title, but merely a right to possession, an answer containing only a general denial is not a denial of the landlord's title.

Appeal from Buchanan Circuit Court.—*Hon. Wm. K. Amick,* Judge.

REVERSED.

C. V. Hickman and *H. K. White* for appellant.

W. S. Herndon for respondent.

Digitized by Google

ELLISON, P. J.—This is an action for the possession of certain farm lands in Buchanan county and rents thereof. The judgment in the trial court was for the plaintiff for the possession and for $256.82 as damages and $33.50 monthly value of rents.

The title to the property is not questioned; the controversy relates to defendant's rights as a tenant under a certain lease. At the inception of the controversy plaintiff was the wife of A. P. Shull, but before its close she was divorced from him in the year 1909. The land formerly belonged to plaintiff's father and at his death was inherited by her and her brother John. When the father's land was partitioned the part now in controversy was allotted to plaintiff. Then she, in January, 1910, sold it to her uncle, Francis R. Allen, and he, in the following December, brought this action against defendant, but before it was reached for trial he died, leaving plaintiff and her brother John as his sole heirs, and they divided the lands by their respective deeds, John's deed being made to her and her husband. But notwithstanding such joinder of the husband as a grantee, the land in controversy by force of the law (as we shall presently see) again became plaintiff's. Then she was substituted for her deceased uncle as party plaintiff and filed an amended petition, to which defendant filed a general denial by way of answer; upon which pleadings the case went to trial by the court without a jury.

It seems that plaintiff's husband, before they were divorced, thought he had an interest in the land, perhaps an estate by the entirety, and he made the lease to defendant for five years by reason of which the latter claims he has yet a right to possession. But this idea of the husband's was ill-founded. Though the deed was made to him and plaintiff, he took no interest, as the land deeded was already hers as tenant in common with her brother and coheir, and the deed from him was not a conveyance of title even

Digitized by Google

to her, much less to her husband. It was merely setting off the boundaries to land she owned by title through inheritance from her uncle. [Whitsett v. Wamack, 159 Mo. 14; Starr v. Bartz, 219 Mo. 47, 58.]

However erroneous the view was as to the husband's right to make the lease, he did it and defendant took and held possession under it from August, 1906, without molestation, nearly four years, and during this time plaintiff knew of the lease and that her husband was collecting the rent up to the time of the divorce. And when she afterwards sold the land to her uncle the lease was known to him and recognized by both; the consideration money was discounted or lessened on account of the lease. In addition to this plaintiff stated in her petition for divorce that her husband had taken control of the property and was collecting the rents thereof and she asked that he be required to account to her.

In our opinion there was a distinct recognition of the lease by both plaintiff and her uncle. The uncle being charged with notice and recognition of the lease when he bought the land from plaintiff (Martin v. Jones, 72 Mo. 23; Drey v. Doyle, 99 Mo. 459; Freeman v. Moffitt, 119 Mo. 280), she, as his heir and substitute for him in carrying on this action after his death, would be bound by the notice to him and by his recognition of the lease, even if she had no other notice. Suppose that Francis had not died after beginning this action, but, instead, had deeded the land to another in the way plaintiff deeded it to him, and that other had had himself substituted as party plaintiff, could it be doubted that such other stood in the shoes of Francis? Plaintiff is in the same position such a purchaser would have been; she is chargeable with the same notice that bound her uncle.

Nothing is gained for plaintiff by the fact that she never gave her husband her consent in writing that he might lease her land and collect the rent. For it is

Digitized by Google

enough that her uncle, through whom she claims, was chargeble with a recognition of the lease as above shown. But if more than this were required, it is found in her conveyance to her uncle, which was after she became sole. We think plaintiff is in error in her contention that what we are terming a recognition by plaintiff was a ratification and to be effective must have been in writing because original consent had to be in that form. Though a married woman's consent to her husband's use of her property must be in writing as the statute requires, yet there is no reason why she may not deal with the property as any other person, after death or divorce has separated her from him.

In view of the foregoing, it must be admitted that defendant was not a trespasser in his occupancy of the land. He was an occupant under a claim as tenant. He regularly paid his rent. Plaintiff sought in her divorce action to have such rent diverted to her and that her husband be enjoined from collecting more of it. In all the circumstances which we have stated, he became plaintiff's tenant. And whether a tenant from year to year, or at will, is of no consequence, since if the former, he was entitled to sixty days' notice to quit, and if the latter, thirty days, and he has had neither. [Secs. 7882, 7883, R. S. 1909.]

But plaintiff insists that defendant denied her title and therefore is in the position of a tenant denying title, which makes notice to quit unnecessary. The pleadings do not bear this out. The answer is merely a general denial of the allegations of the petition and the latter does not plead title in the plaintiff, but merely a right to the possession. The denial was merely a denial of such right and it is sustained by a failure to give notice to quit.

The bill of exceptions does not contain the evidence taken, but does contain a finding of facts made by the court at the request of the parties, and after

Digitized by Google

being made was not objected to by either party. On these facts we have concluded the conclusion of law was erroneous. We will say that the trial court concluded from the facts that defendant was a tenant at will, but seems to have overlooked the statute above cited requiring thirty days notice to quit in such character of tenancy.

The judgment is reversed. All concur.

BOONVILLE SPECIAL ROAD DISTRICT, Appellant, v. MARTIN FUSER, Respondent.

Kansas City Court of Appeals, November 3, 1913.

1. **PUBLIC ROAD: Road District: Consolidation: Pleading.** If a person obstructs a public road in a road district and fails to remove it within ten days after notice from the road overseer, he is liable to a penalty of $5 per day, to be recovered by an action instituted by the overseer in the name of the district. F obstructed a road and was notified by the overseer to remove it. Then that district was taken into and became a part of an adjoining special district. The overseer then instituted an action against F in the name of the latter district. It was held to be properly brought.

2. **———: ———: Pleading: Willfully or Knowingly: Equivalent Words.** The statute (Sec. 10533, R. S. 1909) provided that anyone who shall "willfully or knowingly" obstruct a public road shall be liable to a penalty of $5 per day after notice from the overseer to remove it, to be recovered by an action in the name of the district. The petition failed to charge that the obstruction was made willfully or knowingly, but did charge that after notice he refused to remove it and continued to maintain it. It was *held* that this was equivalent to charging willfulness and knowledge.

Appeal from Cooper Circuit Court.—*Hon. J. G. Slate*, Judge.

REVERSED AND REMANDED.

Digitized by Google

W. G. Pendleton, W. F. Johnson and *Roy D. Williams* for appellant.

John Cosgrove and *Daniel Cosgrove* for respondent.

ELLISON, P. J.—This action was brought against defendant for five dollars, the penalty prescribed for obstructing a public road. The case is based on section 10533, Revised Statutes 1909, prescribing a penalty for road obstruction, to be recovered in an action prosecuted by the road overseer in the name of the road district. The trial court sustained a demurrer to the evidence for plaintiff, and judgment was rendered for the defendant.

The evidence for plaintiff tended to show that the road was a public one and that defendant had obstructed it and that the road overseer had given him ten days' notice to remove the obstruction as provided by the statute aforesaid, and that he refused to comply with the notice. But defense is based on the following facts also appearing in evidence: It will be noticed that this plaintiff is called "Boonville Special Road District of Cooper County," while the evidence showed the obstructed road was in "Road District Number 5" at the time the obstruction was erected. But it was further shown that thereafter and before the beginning of this action, district number five, under article 6 of chapter 102, Revised Statutes 1909, was, at an election held for that purpose, consolidated with or taken into and made a part of the plaintiff district, which adjoined it. In such circumstances we think the latter district is the proper plaintiff. We think the question asked in plaintiff's brief is pertinent. It is this: "Suppose district No. 5 had begun suit and pending same, and before final judgment, the district had become legally wholly consolidated with

Digitized by Google

the plaintiff district. Would the action have abated, or would the action have continued in the name of the new district?"

The statute (Sec. 10533) reads that after notice given and ten days have elapsed the penalty and liability to a fine have accrued, "such fine to be recovered by suit brought by the road overseer, in the name of the road district, in any court of competent jurisdiction." This evidently does not nullify the offense by destroying its mode of punishment. The statute by prescribing that the action shall be brought "in the name of the road district," did not intend to nullify the offense by destroying its mode of punishment in instances where the district offended against had been lawfully taken into another district. It could hardly be thought that if this action had been instituted before consolidation in the name of district five, and consolidation had while pending, that it would have abated the action.

The peremptory instruction is also defended on the ground that no offense was charged in the petition. No demurrer was offered to it. The statute aforesaid reads that "Any person or persons who shall willfully or knowingly obstruct or damage any public road," etc. The petition charges that defendant obstructed the road by erecting a fence thereon, omitting to charge that he willfully or knowingly did so. But it does allege that the overseer "notified said defendant by writing to remove said obstruction, and that said obstruction has not been removed and has ever since been maintained by said defendant." We think that is tantamount to an allegation that he willfully or knowingly obstructed the road. Allowing that he may have fenced the road inadvertently, that condition of mind could not have continued after notice of what he had done. When he persisted in maintaining the fence af-

Digitized by Google

ter notice of his wrong, he did it both willfully and knowingly.

The judgment is reversed and the cause remanded, to the end that a trial may be had and the defense, if there be any, may be heard. All concur.

MATILDA PONTIUS, Administratrix of the Estate of DANIEL PONTIUS, Deceased, Appellant. v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., Respondent.

Kansas City Court of Appeals, November 3, 1913.

1. **NEGLIGENCE: Railroads: Overhead Crossing.** Where a railroad crosses or runs parallel to a public road or street the trainmen owe no duty to refrain from making usual and necessary noises incident to the proper and safe operation of a train but to be within the bounds of reasonable care, which is the test of duty, must not operate it in an unusual or unnecessary way and thereby endanger the safety of travelers on the highway.

2. ———: ———: ———: **Negligence per se.** It is not negligence *per se* for the whistle of a running locomotive to be sounded under a highway bridge, but engineers should not sound the whistle, when passing under a bridge where horses and vehicles are likely to be passing over at any time.

Appeal from Grundy Circiut Court.—*Hon. Geo. W. Wannamaker*, Judge.

AFFIRMED.

Platt Hubbell and *George Hubbell* for appellant.

Paul E. Walker, E. M. Harber and *E. R. Sheetz* for respondent.

Digitized by Google

JOHNSON, J.—Daniel Pontius began this action in 1905, in the circuit court of Grundy county, to recover damages for personal injuries he alleged were caused by negligence of defendant in frightening a mare he was driving on one of the public streets of the city of Trenton and causing her to run away. Defendant demurred to the petition on the ground that it failed to state a cause of action but the demurrer was overruled and defendant answered with a general traverse and a plea of contributory negligence. The trial occurred in June, 1906, and resulted in a verdict and judgment for defendant. Pontius filed a motion for a new trial in proper time but the cause was continued from term to term and the motion was not heard until February, 1911, when it was overruled. In the meantime Pontius died and at the September, 1910, term the court entered an order reviving the action in the name of the administratrix of his estate. She filed a motion in arrest of judgment which was heard with the motion for a new trial and overruled. An appeal was allowed but on account of delay in preparing and filing the bill of exceptions the cause could not be heard in this court until the present term. The administratrix died in January, 1913, and was succeeded by Jacob Pontius who was appointed administrator *de bonis non* of the estate of Daniel Pontius and by stipulation of the parties was substituted as party plaintiff.

At the time of his injury which occurred in the afternoon of September 27, 1905, Pontius was driving westward on Bridge street in a single buggy drawn by his mare which was accompanied by her young colt. Defendant's railroad crosses this street in a cut twenty-two feet deep which is spanned by a bridge seventy feet long and forty feet wide. Trenton is a division station and defendant's railroad yards at that place are extensive and have their north terminal near the overhead bridge described. A southbound freight

Digitized by Google

train, consisting of a locomotive, thirty-three cars and a caboose, had stopped at a place in the cut where smoke from the locomotive came up through the bridge. The engineer had been compelled to stop the train to wait for a clear track into the yards and had signalled the rear brakeman to go back along the track a sufficient distance to flag any train that might be following. There is a sharp controversy in the evidence over the position of the locomotive while the train was stationary. Pontius testified that it stood under the bridge while the trainmen stated that it was about one hundred feet north of the bridge. In our view of the case the exact location of the engine in the cut is not a fact of vital importance. It was either under the bridge or so close to it that blasts upon its whistle would be and, in fact were, terrifying to horses which had been stopped by their drivers at or near the bridge awaiting the removal of the locomotive which on account of the noise and ascending smoke, made driving over the bridge unsafe and dangerous. While the train was standing a switch engine came from the south and was attached to the freight engine to help pull the train into the yards. This operation of the switch engine added to the noise and increased the volume of smoke that ascended through the bridge. When the engineer of the freight engine received a signal to proceed into the yards he sounded five blasts of the whistle as the customary signal to recall the rear brakeman who found it necessary, in order to prevent a possible collision, to go back on the track three quarters of a mile.

Pontius came from the east while the train was standing in the cut and in common with other drivers of teams and horses going in the same direction stopped near the east end of the bridge and waited ten minutes or more for the train to go on. His mare, which was gentle and well broken but somewhat spirited, became uneasy and restive at the sights and sounds

Digitized by Google

coming from the engines in the cut but he had no difficulty in controlling her until the whistle sounded the signal recalling the rear brakeman. At the second blast she became unmanageable and ran away inflicting the injuries of present concern.

The petition alleges "the plaintiff, then and there, approached the said overhead bridge of said street and stopped on the east side and within several feet of said overhead bridge, where one of defendant's locomotive engines was under and passing under said bridge. The defendant through its servants and agents then and there negligently caused the steam whistle of said engine to blow and emit several loud, shrill blasts, which blasts of said steam whistle instantly frightened the plaintiff's horse and said horse thereby became suddenly terror stricken and unmanageable, and ran away, jumped down a rock embankment, turned the buggy over, threw the plaintiff out of the buggy onto a brick pavement thereby inflicting grievous personal injuries to plaintiff," etc.

Counsel for defendant in answer to the contention of their opponents that numerous errors prejudicial to plaintiff were committed at the trial argue that since the petition omits to allege that the act of sounding the whistle under the bridge was unnecessary, it fails to include an essential element of a good cause of action and is so vitally defective that the court erred in overruling the demurrer and in overruling the subsequent objection offered at the trial against the introduction of any evidence. And on the hypothesis that the evidence when considered in its phase most favorable to plaintiff fails to show that the whistling was unnecessary to the proper operation of the train, counsel further insist that the demurrer to the evidence asked by defendant should have been given. On the other hand the sufficiency of the petition and of plaintiff's evidence to take the case to the jury are predicated by counsel for plaintiff upon the theory that the

Digitized by Google

pleaded and proved fact of whistling under the bridge, of itself, bespeaks a negligent breach by defendant of a duty it owed travelers on the public highway of which the bridge was a part and imposed the burden upon defendant of showing that such an act was indispensable to the proper operation of the train.

The gist of the action is a negligent breach of duty defendant owed to Pontius and the burden of pleading and proving such actionable negligence remained with the plaintiff to the end of the case. If an act resulting in an injury is of such a nature that all reasonable minds would unite in pronouncing it a culpable breach of duty, it is negligence in law. "Negligence is always a question for the jury when there is any doubt as to the facts or as to the inferences to be drawn from them," (Railroad v. Barnett, 59 Pa. St. 259), but is a question of law where no such doubt appears and where, as stated, the established facts leave no room for an honest difference of opinion among reasonable minds. If the mere act of sounding the whistle under the bridge in any event and under any circumstances was *per se* negligence, i. e., negligence in law, plaintiff discharged his burden of proof in showing that such act was the proximate cause of the injury of Pontius and the court did not err in overruling the demurrer to the evidence; but if such act was prompted by a necessity for its performance in the proper operation of the train, plaintiff has failed to make out a case to go to the jury, since he has failed to show one of the constitutive facts of a good cause, viz., that the act was unnecessary.

It does not appear and is not charged that the train was stopped at an improper place. It was seeking admittance to the yards and could not go on until a clear track was prepared for it. The rules of the company, as well as the obvious and most peremptory necessities of the situation, required the engineer to signal the rear brakeman to go back on the track for

Digitized by Google

the protection of life and property. That signal consisted of four blasts of the whistle which were given before Pontius arrived at the east end of the bridge. It was just as necessary to the proper operation of the train to call back the brakeman when the train was ready to proceed as it was to send him out and if the engineer was negligent in giving one signal he was negligent in giving the other. That both signals were necessary is a fact about which there can be no dispute. They were the only adequate means the engineer had for communicating with trainmen and others connected with the operation of the train and to hold that he had to refrain from using them because of his duty towards travelers waiting to use the bridge would be to place that duty above the duty to properly operate and protect his train and to prevent it from coming into collision with other trains. The law in this State gives superiority to the latter duty. Where a railroad crosses or runs parallel to a public road or street the trainmen owe no duty of refraining from making usual and necessary noises incident to the proper and safe operation of a train but to be within the bounds of reasonable care, which is the test of duty, must not operate it in an unusual or unnecessary way and thereby endanger the safety of travelers on the highway. [Brown v. Railway, 89 Mo. App. 192; Feeney v. Railroad, 123 Mo. App. 420; Phelan v. Paving Co., 227 Mo. l. c. 708.] The controlling question, therefore, in every case of this character is whether the injury was caused by an unusual or unnecessary manipulation of the train and the burden is on the plaintiff to show by proof that the injurious act was unusual or unnecessary. As is well said by the Supreme Court of Pennsylvania in Farley v. Harris, 186 Pa. St. l. c. 442: "An act, in itself lawful, and which may have been prompted by the exercise of care, yet which incidentally results in injury to another, does not justify an inference of negligence. To hold otherwise would cast on every steam railroad

Digitized by Google

and factory the burden of proving in every case where a horse was startled by a steam whistle, that the use of it at that particular juncture was not negligence, but for a proper purpose; thus, in effect, raising a presumption of negligence against a defendant from the mere use of an entirely lawful appliance. Concede, as we do concede, in all its force, the principle that an act, in itself lawful, may be negligently performed, nevertheless, if negligent performance be averred, it must be proved. It will not be presumed from the mere fact of injury to another."

In that case it was held that it is not negligence *per se* for the whistle of a running locomotive to be sounded under a highway bridge. In Brown v. Railway, supra, we observed by way of illustration, that engineers should not sound the whistle "when passing under a bridge where horses and vehicles are likely to be passing over at any time," and the Supreme Court of Tennessee expressed the same view in Mitchell v. Railroad, 100 Tenn. 329, in a case where the whistle of a running train was sounded under a bridge and frightened a team that was being driven across. We quote from the opinion (l. c. 332): "Ordinarily the use of a whistle is of machinery and appliance necessary for many practical purposes, and where used under ordinary circumstances, no inference of negligence could be drawn, but it is obvious that a blowing under a bridge is, in the absence of some special necessity therefor, an unnatural and reckless act, liable to cause great damage, and the circumstances and surroundings call, therefore, for proof of its necessity when the act occasions the damage to be anticipated. The proof of such a blowing under such circumstances is sufficient to authorize the presumption of negligence. The onus is shifted, to explain and justify or excuse it, upon him who does it. This burden may be successfully carried, but it cannot be avoided by demurrer to plaintiff's evidence establishing the act."

Digitized by Google

In effect the rule announced in these two cases is that an inference of negligence may be indulged by the triers of fact from the act of an engineer of a running train in surprising teams crossing an overhead bridge with terrifying blasts from the locomotive whistle emitted under the bridge. On the face of it such an act ordinarily would seem to be unnecessary and to denote a disregard for the rights of others, though there might be some sudden emergency, such as the discovery of animals on the track, that would make its performance imperative, in which event it could not be regarded as negligence under our ruling in the Brown case. However this may be, the present case does not fall within the scope of that rule and there is nothing in its facts from which an inference of negligence may be indulged. This heavy freight train had been stationary for more than ten minutes. There was no one on the bridge nor had the engineer any reason to anticipate that anyone would be surprised there by the blowing of a signal which was necessary to be given. To say that the engineer might not use the whistle, the only means available, to send out and call back the rear brakeman without being guilty of negligence, would be to deny the existence of his duty to properly protect his train and any other that might be following it. The injury of Pontius is shown conclusively to have been caused by one of the ordinary risks of a proper operation of a train over a road crossing, which he should have anticipated and might have avoided.

It is not necessary to decide whether or not the petition would be sufficient to support a verdict. The evidence shows plaintiff has no case and the learned trial judge would not have erred had he sustained the demurrer to the evidence. With the case in such posture the errors assigned by plaintiff are immaterial as is also the point made by counsel for defendant against the order reviving the cause.

The judgment is affirmed. All concur.

Digitized by Google

ROBERT E. BRADEN, Respondent, v. CHICAGO BURLINGTON & QUINCY RAILROAD CO., Appellant.

Kansas City Court of Appeals, November 3, 1913.

1. **MASTER AND SERVANT: Damages: Railroads.** While plaintiff was cutting weeds and grass for the defendant along its right of way, his horse fell into a concealed ditch and was so badly hurt that it had to be killed. *Held*, that the injury to the horse was due to a risk assumed by plaintiff and cannot be attributed to any negligence of defendant.

2. ———: ———: ———. A servant assumes the risks that are ordinarily incident to the service he undertakes. A master is not an insurer of the safety of his servant and the measure of his duty is not to furnish his servant an absolutely safe place in which to work, but a place free from all risks and dangers that are not ordinarily incident to the kind of work the servant is employed to perform.

3. ———: ———: ———: Assumption of Risk. The assumption of a risk appears to involve the facts of comprehension, that a peril is to be encountered and a willingness to encouter it; that is to say, a positive exercise of volition in the form of assent to the risk.

Appeal from Livingston Circuit Court.—*Hon. Arch B. Davis*, Judge.

REVERSED.

O. M. Spencer, Frank Sheetz, Maurice Roberts for appellant.

Paul D. Kitt for respondent.

JOHNSON, J.—Plaintiff, a farmer, was employed by a section foreman of defendant in August, 1910, to cut weeds and grass on defendant's right of way for a distance of about three-quarters of a mile west from Utica station. He was to use his team and mowing machine where it was practicable and to cut the re-

Digitized by Google

mainder by hand. One of the section men accompanied him. After working with his machine until near the close of the first day, one of the horses fell into a ditch on the right of way and was so injured that he had to be killed.

Plaintiff sued in a justice court to recover the value of the horse on the ground that its death was caused by defendant's negligent breach of a duty to warn him of the ditch, the presence of which, plaintiff contends, was concealed by a very thick and rank growth of weeds. The cause was tried in the circuit court without the aid of a jury and resulted in a judgment for plaintiff. Defendant appealed.

The evidence consisted of the testimony of plaintiff and his companion, the section hand who was sent by defendant to help him. While driving the mowing machine westward on the south side of the railroad they came to a natural drainage ditch that crossed the right of way from southeast to northwest and crossed under the track through a culvert. The track was on an embankment that was, perhaps, sixteen feet high, perpendicular measure, and had sloping sides. The ditch was about six feet wide and six feet deep. Although, as stated, the weeds were very thick, plaintiff says he observed the ditch when he was forty feet from it and got off of the machine and went forward on foot to see if he could drive the team and mower across it. Another natural drainage ditch about two and one-half feet wide and two and one-half feet deep coming from the west on a course parallel to the embankment, emptied into the larger ditch at a point estimated by plaintiff as being twelve or fourteen feet and by the helper as being six feet south of the culvert. Plaintiff states that he did not discover this small ditch on account of the weeds and drove across the larger one without knowing of its presence. His team crossed at a place just north of the small ditch and his machine had just reached the top of the west bank when the

Digitized by Google

near horse fell and landed on his back in the small ditch where he remained until the next morning. His injuries were so severe that plaintiff decided to kill him. Plaintiff testified that he did not know what caused the horse to fall but founds his action on the inference that it stepped or slipped into the concealed ditch. The helper's version of the injury differs materially from plaintiff's and gives a plausible reason for the accident. He states that plaintiff knew of the presence of the small ditch and attempted to drive across to the tongue of land lying between the embankment and the small ditch and that as the machine was ascending the west bank the off horse shied at the culvert and pushed the near horse over into the small ditch.

If we were sitting as triers of fact we would accept the statement of the helper as being more in accord with the conceded physical facts than that of plaintiff. It is difficult to believe that plaintiff could not and did not see the mouth of the small ditch and the break in the weeds that must have been plainly marked by its course if, as he states, he could see the large ditch forty feet away and made a careful inspection to determine whether or not he could cross it in safety; but since all issues of fact were resolved by the trial court in favor of plaintiff and the judgment before us necessarily was based on the hypothesis that the small ditch was so concealed by vegetation that plaintiff could not detect it from his position on the east side of the large ditch, nor while he was crossing, we shall accept that view of the occurence, despite its repugnance to plain and conceded physical facts. We do this merely for the purposes of argument and because we are convinced that plaintiff has no cause of action against defendant under any possible view of the facts.

The gist of the cause he asserts is the breach of a master's duty to exercise reasonable care to furnish

Digitized by Google

his servant a reasonably safe place in which to work. He does not claim and would not be heard to claim that such duty compelled defendant to furnish him a smooth and level surface on which to cut weeds (Post v. Railway, 121 Mo. App. 562), but does contend that defendant was bound to warn him of the presence of natural drainage ditches that were obscured by vegatation and into which he, unawares, might drive his horses to his injury and damage.

The rules are too well settled to call for discussion or require the citation of authorities that a servant assumes the risks that are ordinarily incident to the service he undertakes; that the master is not an insurer of the safety of his servant and that the measure of his duty is not to furnish his servant an absolutely safe place in which to work, but a place free from all risks and dangers that are not ordinarily incident to the kind of work the servant is employed to perform. As stated in Elliott on Railroads (2 Ed., sec. 1283):

"The general rule is that where the danger is an extraordinary one, that is, a danger not ordinarily incident to the service, and the employer has knowledge of such danger, he is guilty of negligence if he fails to warn the employee. Where, however, the danger is obvious to a person of ordinary intelligence and one that can be known and appreciated by a person who exercises ordinary prudence and care, or where it is not an extraordinary peril but is one incident to the service, there is no duty to give warning unless the person employed has not reached the years of discretion."

Counsel for plaintiff ask, "How can a servant assume something of which he has no knowledge, actual or constructive?" and answer the question by pointing to the rule that "The assumption of a risk appears to involve the facts of comprehension that a peril is to be encountered and a willingness to encounter it; that

Digitized by Google

is to say, a positive exercise of volition in the form of assent to the risk." [Adolff v. Baking Co., 100 Mo. App. l. c. 209; Roberts v. Tel. Co., 166 Mo. l. c. 378.]

This is true, but does not a servant hired to mow a field have both actual and constructive knowledge of the topographical features common to all fields? Hills, slopes, vales, water and drainage courses, gullies, large and small, stumps and sometimes stones, are general characteristics, and a farmer employed to mow a field covered with rank vegetation knows that he will encounter many such natural obstacles and must be on the lookout for them. If such are not natural risks, it is hard to imagine any that would be. Must a farmer who hires a man to mow his field warn him beforehand of every hidden gully, stump or stone on pain of being forced to answer in damages for any injury to his servant that may result from such a risk? The suggestion is too absurd to be entertained for a moment. Such risks are natural, incidental to the employment and are assumed by the servant. The mere fact that plaintiff was employed by a railroad company to mow its field instead of by a neighboring farmer is immaterial. The same law applies to all classes of employers.

Clearly the injury to the horse was due to a risk assumed by plaintiff and cannot be attributed to any negligence of defendant.

The judgment is reversed. All concur.

Digitized by Google

THE STATE OF MISSOURI at the Relation of FRANCIS LYONS, Appellant, v. THE BANK OF CONCEPTION, a Corporation, Respondent.

Kansas City Court of Appeals, November 3, 1913.

1. **MANDAMUS: Nature of Writ: Issuance Rests in Sound Judicial Discretion.** A peremptory writ of mandamus is not a writ of right. Cases may arise where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise judicial discretion, still refuse to issue the writ.

2. ———: ———: ———: **Mere Naked Right.** It will not be granted to enforce a mere naked right.

3. ———: ———: ———: **Other Remedy Open to Relator.** Although the existence of an equitable remedy open to relator will not deprive a party of his legal remedy by mandamus, yet the fact that an equitable remedy exists may influence the exercise of the court's discretion as to whether it will issue the writ. And if an equitable proceeding will cover the entire subject in dispute, and the court in such equity case can grant general as well as special relief, then the writ of mandamus will be refused.

4. ———: ———: **Not Issued Conditionally: Peremptory Writ Must Follow the Alternative.** Conditional writs of mandamus are never issued. The peremptory writ always issues in the same terms as the original writ except that the former includes the word "peremptorily" and omits the alternative of showing cause for noncompliance. Nor can the peremptory writ be altered to suit what upon the return may be considered the justice of the case. The peremptory writ can grant no relief not specified in the alternative writ, and if not warranted in granting that must refuse any. The writ cannot be granted upon equitable terms, for while equitable rights may be considered by the court in determining whether the writ shall issue, yet when it does issue equity can have nothing further to do with it.

5. ———: **Return: Tendering Issue.** If an issue on the facts is to be tendered the return must specifically deny such facts. The return may, however, be in the nature of a plea by way of confession and avoidance, in which case it must set up all the facts necessary to prevent the writ being issued. Or it may set up facts which may not prevent the writ from issuing but

Digitized by Google

which will appeal to the court's discretion as to whether the writ shall go. The court is not bound to take the case as the applicant puts it but may consider all the facts in deciding whether it will issue the writ or not.

Appeal from Nodaway Circuit Court.—*Hon. Wm. C. Ellison,* Judge.

AFFIRMED.

J. C. Growney for appellant.

Cook, Cummins & Dawson for respondent.

TRIMBLE, J.—This is a proceeding in mandamus brought by relator to compel the Bank of Conception to acknowledge and treat him as a stockholder in said bank, to restore his name on the stock book and records thereof as a stockholder owning three shares of its capital stock of the par value of $100 per share, and to do such other act or acts as may be needful and necessary to fully and completely restore said relator to all the privileges, rights and benefits of a stockholder in said corporation. Upon the issuance and service of the alternative writ, the bank appeared and filed, finally, a second amended return, to which relator replied, and upon these, the alternative writ, the second amended return and the reply, the case went to trial. The court, after hearing the evidence, declined to issue the peremptory writ and relator appealed.

There is practically no dispute over the material facts. The bank was a corporation with a capital stock of $15,000 comprising 150 shares of the par value of $100 each; and relator was a young man twenty years of age who owned three of such shares which he had received as a gift from his father. In April, 1907, the bank became hopelessly insolvent, and was declared so by the State Bank Examiner who took charge of it and

Digitized by Google

ordered it closed and would not permit it to be reopened unless it was put on a solvent basis. The condition of the bank was so deplorable that not only was its capital stock completely wiped out, but, in addition to this, there were $30,000 of worthless or doubtful notes due the bank, and even if these were made good it would still require $15,000 cash to pay the claims of creditors. It was the only bank in the village and it was a matter of much local interest and concern to have the bank reopen and continue if possible. For this and other reasons, all the stockholders, except relator, as well as a large number of the depositors, were anxious to find some plan by which the bank could be preserved as a going concern. Thereupon, with the approval of the Bank Examiner, certain of the stockholders agreed to execute a bond guaranteeing $30,000 of the insolvent notes, and it was also arranged that an assessment of $200 should be made on each share of stock thereby raising a cash fund of $30,000 which would replace the capital stock, pay off the rest of the claims against the bank and put it in sound financial condition. All the stockholders, except relator, agreed to this plan and either paid the assessment of $200 per share, or voluntarily surrendered their stock, which was worthless, and in lieu thereof other stock of the par value of $100 a share, was issued to other persons who paid the required assessment of $200 per share. But, when relator was informed of the plan and asked to contribute $200 on each of his three shares, he refused to do so. And, when told that if he would surrender his shares, as others had done who could not pay the assessment, other persons, in order to save the bank, would take his place as a stockholder and pay in the $600 required of him, he declined to do that also. One of the stockholders, in order to have the plan of reorganization go through, then offered to buy relator's shares, but this was likewise refused. Not being able to induce re-

Digitized by Google

lator to either pay his part in the rehabilitation of the bank or to get out of the way so that others could do so, and thereby save the bank, relator's stock was cancelled, and other stock of like amount was issued to others who paid the $600 assessment thereon. The bank then reopened and has continued doing business ever since. Of the $30,000 bond given to guarantee the insolvent notes, the bondsmen have paid $28,000 and none of said insolvent notes have been collected. About $13,000 of notes classed as doubtful have been paid by the debtors, but this fact does not render the old stock in the bank at the time of the failure of any value since the amount paid is less than the deficit remaining after taking out the capital stock and guaranteeing the $30,000 worth of insolvent notes at their face value.

After the bank reopened and was doing a prosperous business, relator demanded recognition as a stockholder. The bank refused to accord this to him, although prior to the reorganization, full opportunity was given relator to examine the books and assets of the bank in order that he might determine for himself whether or not it was insolvent. Upon being denied recognition as a stockholder in the reopened bank, relator brought this suit in mandamus to compel the bank to accept and treat him as such "and to do such other act or acts as might be needful and necessary to fully and completely restore relator to all the privileges, rights and benefits of a stockholder" because of the certificate of three shares owned and held by him.

As stated before, the trial court, after hearing the evidence, refused to issue the peremptory writ, and we are asked to review its action in that regard.

It will be observed that the question for our consideration is not whether mandamus is a proper remedy for a stockholder to invoke under ordinary circumstances where he is being denied his rights in the corporation to which he claims to belong, and in which the issuance of the peremptory writ will affect only re-

Digitized by Google

lator and the respondent. The question is, was the trial court, under the peculiar circumstances of this case, compelled by the rules of sound judicial discretion to grant the peremptory writ? If not, then the court's action in refusing the writ ought not to be reversed. Was its refusal within the bounds of sound judicial discretion?

Mandamus is a legal and not an equitable remedy. [26 Cyc. 141; Merrill on Mandamus, sec. 3.] Of necessity it is a stern, harsh writ, and, when issued, is an unreasoning, inflexible, peremptory command to do a particular thing therein specified without condition, limitation or terms of any kind. Its office is to execute, not to adjudicate; nor can it ascertain or adjust mutual claims or rights between the parties. Being of such a nature, it is not a writ of right to which relator is entitled without regard to the circumstances under which he is demanding its use. Whether it shall be granted or refused rests in the judicial discretion of the court applied to the situation before it and governed by certain established principles and rules of law. The writ is employed only in unusual cases where other remedies fail; the relator must in all cases substantially demonstrate not only the propriety but the justice of his case; the court is not bound to take the case as relator presents it, but may consider defendant's rights, the interest of third persons, the importance or unimportance of the case, and the applicant's conduct in determining whether or not the writ shall go. [26 Cyc. 144.] In some cases it is held that even where a clear prima facie right to the writ is shown, it may be refused. [26 Cyc. 145; State ex rel. v. Bridge Co., 206 Mo. 74, l. c. 134; Merrill on Mandamus, sec. 62; People v. Rock Island, 215 Ill. 488.] It should not issue to compel a technical compliance with the letter of the law in violation of its plain intent and spirit. [Wiedwald v. Dodson, 95 Cal. 450.] It is never

Digitized by Google

granted in doubtful cases. [High on Extraor. Legal Rem. (3 Ed.), Sec. 9; State ex rel. v. McIntosh, 205 Mo. 589, l. c. 610.] If there is a doubt of either its necessity or propriety it will not go. [26 Cyc. 146.] "Cases may therefore arise where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise judicial discretion, still refuse the relief." [State ex rel. v. Bridge Co., 206 Mo. 74, l. c. 135; State ex rel. v. Kansas City, etc., Railroad Co., 77 Mo. 143.] Merrill on Mandamus further lays down the rules that the writ will be refused if it operates harshly (Sec. 73); or where third parties not before the court may be injuriously affected (Sec. 83). To justify the issuance of the writ it must appear that a substantial interest is involved as it will not be granted to enforce a mere naked right. [Spelling Extraor. Rem., sec. 1612.] While the existence of an equitable remedy will not operate to deprive the court of power to issue the writ, yet the existence of such a remedy may be taken into consideration as an influential, though not a controlling, factor in the determination of the question whether or not the writ should be issued. If an equitable proceeding will cover the entire subject in dispute, and the court in such equity case can grant general as well as special relief, then the writ of mandamus will be refused. [Spelling, sec. 1376.] Although the existence of an equitable remedy will not deprive a party of his legal remedy by mandamus, yet, the fact that an equitable remedy exists may influence the exercise of the court's discretion as to whether it will issue the writ. [26 Cyc. 172; People ex rel. v. New York, etc., Railroad, 61 N. E. 172; People v. Mayor, etc., of New York, 10 Wend. 395.] Even where a clear legal right is shown, this extraordinary remedy rests, to a considerable extent, within the sound discretion of the court, subject, of course, to well-established principles; and evidence

Digitized by Google

will usually be received, upon request of the respondent to show that the writ should not issue. [Spelling, sec. 1371.] Applying these rules to the case in hand we see that there are a number of reasons why it was not an abuse of discretion to refuse the writ in this case. 1. The absolute worthlessness of relator's stock whereby his right does not involve a substantial interest but at most only a mere naked, technical legal right. 2. The inflexibility of a peremptory writ, which cannot be issued with terms of condition therein so as to adjust any mutual claims and demands which may exist between relator and the bank or between him and the other stockholders. 3. The possibility of doing injustice to third persons not before the court, and the impossibility of knowing what results will flow from the granting of the peremptory writ to acknowledge and treat relator "as a stockholder with all the privileges, rights and benefits thereof in such corporation." 4. The existence of a full and complete remedy open to relator by a bill in equity in which he can secure, not only the special rights he seeks in this case, but also all general rights incident to his status as a stockholder; and in which equitable suit all equities on each side can be taken into consideration and adjusted without harm, disorder, injustice, or confusion to anyone. Now, while it is true that the trial court, in refusing to issue the peremptory writ, found that relator's stock was worthless, still that was only one fact presented by the situation, and does not prevent all the other reasons above enumerated from entering into the question of whether the peremptory writ should be granted. In fact, the finding that the stock was worthless and that relator has no part or share in the money now in the bank's capital, creates or calls into existence the enumerated reasons against issuing the writ. There was no controversy in the evidence as to the stock being absolutely worthless in the condition in which the bank was when it closed. It has

Digitized by Google

been suggested that even if the bank was insolvent, still relator's stock was not without some value, since, relator by holding it would be entitled, after claims against the bank had been satisfied, to his pro rata share of any assets realized out of the supposed insolvent claims, and also to share in any sums recovered by the bank from its officers if it should turn out there had been unlawful mismanagement thereof. As to the possibility of any such assets being collected, or of any wrongful mismanagement of the bank on account of which the bank could recover from its officers so as to call into existence a fund in which relator would be entitled to participate, there is neither an allegation nor the slightest showing. So that at most his ownership of three shares in the insolvent bank would confer on him only a bare technical right to investigate the collection of the bank's assets and the liability of its officers for supposed mismanagement, so that if, from either source, funds should be obtained in excess of the bank's debts, relator could participate in them. But even this will not entitle him to a peremptory writ. A mere naked right is not sufficient to justify its issuance; nor will the fact that he might in the future have a substantial interest by reason of his shares be sufficient to entitle him to the writ. Where relator's substantial rights are conditional upon the happening of some other event or act not yet transpired or performed, the writ will not issue. [O'Neill v. Reynolds, 116 Cal. 264.] So that, even upon the theory that there is a property right in relator's three shares because it gives him the right to investigate the bank's affairs and management and, in the event anything of value is recovered, to participate therein, this does not entitle him to demand that the writ issue, regardless of any other consideration.

Relator refused to do anything to help put the bank on a solvent basis so that the State Bank Examiner would permit it to reopen. Upon his refusal either

Digitized by Google

to do his part or to get out of the way so that others might do what he would not, a large sum of money, nearly $60,000, four times the capital stock of the bank, was put into the institution that it might be preserved. Surely no one will contend that relator should be allowed to share in this money thus contributed by others, and thus far no such contention has been openly made. If, therefore, relator is to be given a place as stockholder in the bank, it cannot be on equal terms with the other stockholders. How can the relation of the parties be properly adjusted by a writ of mandamus? If he is ordered reinstated as a stockholder who can say where the results of such order will end. If his status as a stockholder is established by mandamus who is to put any limitations, terms or conditions upon the rights, privileges, and benefits flowing from such status? It has been suggested that although relator is not entitled to any share in the fund created by the other stockholders yet we can grant the peremptory writ on condition that he renounce to the corporation any interest in the fund derived from the voluntary contributions of the other stockholders. The necessity for making the issuance of the writ conditional is an excellent reason for refusing it altogether. Writs of mandamus are not issued with conditions attached. And if the writ herein should be issued in that manner, would the condition be valid? And would relator be under any legal obligation to perform the condition? And as a matter of fact relator has met the suggestion above mentioned, not by complying with the condition proposed but by insisting that no such condition should be attached to the writ. In addition to all this, the application for the writ and the alternative writ seek "to restore relator as a stockholder *with all the rights, privileges and benefits*" pertaining thereto; and the peremptory writ must always follow the al-

Digitized by Google

ternative writ. As said in King v. County Council, 2 Irish Reports, 206, l. c. 214, quoting from Halsbury's "Laws of England," Vol. 10, p. 122: "A peremptory writ always issues in the same terms as the original writ, except that it includes the word 'peremptorily,' and omits the alternative of showing the cause against compliance. The original writ is enforceable in the terms in which it was issued, *or not at all.* Nor will the form of the writ he altered to suit what upon the return may be considered the justice of the case." And our courts hold that the peremptory writ must conform strictly to the alternative writ. [State ex rel. v. Kansas City, etc., Railroad, 77 Mo. 143; State ex rel. v. Baggott, 96 Mo. 63, l. c. 71.] In Mandamus proceedings the court can grant no relief except what is specified in the alternative writ, and if not warranted in granting that must refuse any. [School District v. Lauderbaugh, 80 Mo. 190.] In State ex rel. v. Davis, 54 Mo. App. l. c. 450, it is said, "The contention is that the peremptory writ should have required the adjustment of the defendant's accounts as secretary as a condition precedent to the surrender of the books. This contention is not tenable, for the reason that such a conditional order would not have conformed to the terms of the alternative writ or to the prayer of the petition. The rule in this State now is that the relief asked in the petition for mandamus is the only relief that can be granted on a final hearing."

In fact the proposed granting of the writ upon the condition named is nothing more nor less than a proposal to grant the writ upon equitable terms. And that too in an inflexible extraordinary legal proceeding which has nothing to do with equity; and in the consideration of which no equitable rights or principles can be taken into consideration *except solely for the purpose of determining whether or not the writ should issue.* Up to the point of issuance, the court

Digitized by Google

can take into consideration the equities of the various parties affected in deciding whether the writ shall go. But when the decision to issue the writ is reached, then matters of equity have no place in the proceeding. This leads up to what the writer conceives to be the great reason why the peremptory writ was properly refused in this case. And that is that, owing to the undisputed facts in the case, relator has a full, complete and more appropriate remedy against the bank by bill in equity wherein he can obtain not only the specific relief here sought (unconditionally, if he be so entitled thereto, or conditionally if it be found that conditions should be imposed), but also any and all general relief to which he may be entitled by reason of the subsequent collection of any supposed insolvent assets, or by reason of any funds recovered by the bank against its officers for any possible mismanagement. That he has such remedy, that it is complete and adequate and more appropriate, furnishing him general as well as special relief, is upheld by numerous authorities, among which are Telegraph Co. v. Davenport, 97 U. S. 369; Pollock v. National Bank, 7 N. Y. 274; Pratt v. Taunton Copper Co., 123 Mass. 110; 6 Pomeroy's Equitable Jur., sec. 864; Cook on Stock and Stockholders, sec. 391; and many others. In other cases it has been held that equity and not mandamus was the proper remedy. [Archer v. American Waterworks, 50 N. J. Eq. 33; Bradbury v. Mutual Res. F. Life Assn., 53 N. J. Eq. 306.] In State ex rel. v. Rombauer, 46 Mo. 155, where a share of stock was transferred but the corporation would not recognize the holder of the stock as a stockholder, the trial court refused to issue the writ and relator appealed. The action of the trial court was affirmed on the ground that the relator had another remedy.

Since relator has another remedy in which all matters can be fully investigated without danger of

Digitized by Google

doing injustice to anyone, and since, if he were granted a peremptory writ, there is no way of foreseeing or knowing what results may injuriously flow therefrom to other stockholders whose rights and claims cannot be even considered in mandamus, the trial court did not exceed the bounds of sound judicial discretion in refusing the writ, and therefore, the judgment should be affirmed.

Appellant, in a supplemental brief, insists that the return to the alternative writ did not specifically deny the allegations of the alternative writ, and, therefore, no issue was tendered, and consequently the trial court could do nothing but issue the peremptory writ. The return may, however, instead of denying the allegations of the alternative writ, set up facts showing why the writ should not be issued. [26 Cyc. 452.] The court is not bound to take the case as the applicant puts it, but may consider all the facts in determining whether the writ shall go. [26 Cyc. 144.] The return might be said to be in the nature of a plea by way of confession and avoidance, that is, confessing the facts but seeking to prevent the writ from issuing because of the peculiar situation. This method is approved in State ex rel. v. Beyers, 41 Mo. App. 503, l. c. 507-8. In Chicago v. People, 215 Ill. 235, the return did not dispute the facts but attempted to avoid the issuance of the writ by setting up other facts. The court held this was proper if the facts alleged were sufficient. Such facts might be sufficient to absolutely forbid the court granting the writ, or they might be only such as would address themselves to its sound judicial discretion, and if the court exercised it in refusing the writ, such action should be affirmed unless that discretion has been abused. Finding that it has not been abused, the judgment is affirmed. *Ellison, P. J.*, concurs in a separate opinion; *Johnson, J.*, dissenting.

Digitized by Google

SEPARATE OPINION.

ELLISON, P. J.—I will add to the foregoing opinion that there is a class of cases bearing such near relation to this as to be closely applicable thereto. They are cases where a transfer of stock has been made and the transferee denied recognition in the corporation and his stock nullified. It is held that he has no right to a writ of mandamus for the reason that there are other specific remedies. It was directly so ruled by our Supreme Court. [State ex rel. v. Rombauer, 46 Mo. 155.] In Murray v. Stevens, 110 Mass. 95, the court, in speaking of mandamus to compel the issue of shares of stock, said: "Without undertaking to lay down an invariable rule on the subject, we think it must be said that this process was not intended, and is not well adapted, for the trial of mere questions of property. Where the relator merely seeks to be put in possession of corporate shares which have an ascertainable market value, or which can be bought in the market; and where the incidental rights of ownership (such as eligibility to corporate offices, or the right to vote at corporation meetings) do not depend upon the ownership of the specific shares which are the subject of dispute, but could be as well and fully enjoyed by virtue of the ownership of an equal number of other shares, there would seem to be no occasion to resort to the extraordinary remedy of mandamus." Affirmed in Stackpole v. Seymour, 127 Mass. 104.

In Shipley v. Mechanics Bank, 10 Johns. 484, the bank refused to recognize a transferee of stock or to allow the stock to be transferred to him. The court said: "There is no need of the extraordinary remedy by mandamus, in so ordinary a case. It might as well be required in every case where trover would lie. It is not a matter of public concern, as in the case of public records and documents; and there cannot be any necessity, or even a desire of possessing the identical

Digitized by Google

shares in question. By recovering the market value of them, at the time of the demand, they can be replaced. This is not the case of a specific and favorite chattel, to which there might exist the *pretium affectionis.*"

Other cases directly in point, are Birmingham Fire Ins. Co. v. Commonwealth, 92 Pa. St. 72; Wilkinson v. Providence Bank, 3 R. I. 22; Baker v. Marshal, 15 Minn. 177; Durham v. Monumental Silver Mining Co., 9 Ore. 41; Kimbal v. Union Water Co., 44 Cal. 173; Galbraith v. Building Assn., 43 N. J. L. 389; Freon v. Carriage Co., 42 Ohio St. 30.

It is evident that if relator was to accomplish what he seeks by the aid of mandamus, he would be placed in a situation of equality of authority and profit in those things which it is claimed the management, effort and money of other persons have brought about. In the opinion by Judge TRIMBLE we have shown that there is a procedure open to him whereby it may be unconditionally commanded that he be put into that position if he is so entitled; or whereby, on equitable adjustment, he may be put there conditionally on his doing equity; or, if equity so demands in the circumstances of the showing which may be made, that he be compensated for whatever loss he may have sustained by the conversion of his stock. There seems to be no good reason why he should not be remitted to such procedure; or, if he so chooses, to an ordinary action at law for damages for loss of his stock.

I think the judgment should be affirmed.

ON MOTION FOR REHEARING.

TRIMBLE, J.—It is earnestly insisted, in a motion for rehearing, that the opinion proceeds upon a mistaken view of the facts when it says the trial was had upon the alternative writ, the *second* amended return, and the reply; that the second amended return was not

Digitized by Google

filed until after the evidence had been introduced; that only in the second amended return was there any allegation of the insolvency of the bank; and that it was error to thus allow the second amended return to be filed at this time.

In the first place appellant did not see fit to incorporate the prior returns in the abstract. Only the second amended return is set out therein, so that we cannot say with absolute certainty that no allegation in reference to the insolvency of the bank was contained in said prior returns.

But, however this may be, it is not material whether they did or not, since the court did not err in allowing the second amended return to be filed. The parties stipulated in open court that it could be so filed. Counsel for appellant is not the same counsel who tried the case, and for this reason may, perhaps, be excused for overlooking this solemn agreement made between the parties at the beginning of the trial:

"By the Court: It is agreed by the parties that after the evidence is in either the relator or respondent shall have the privilege of amending any pleading in the case so as to conform to the facts.

"By Mr. Moran, counsel for relator. That is the agreement.

"By Mr. Cummins, counsel for respondent. All right.

"By the Court. Or that otherwise becomes necessary in their judgment."

It cannot be successfullly claimed that the above agreement was limited to the evidence heard at that time. Because the agreement was that "after the evidence is in" either party should have the privilege of "amending any pleading so as to conform to the facts." And the fact that there was an interval between the evidence taken at that time and the evidence heard later, and that said second amended return was not filed until after this last evidence was in, cannot

Digitized by Google

alter the matter. Because the later evidence was but a continuation of the former trial, as shown by the following agreement entered into at said later hearing:

"By Mr. Moran, counsel for relator. There is an oral agreement between Mr. Cummins and myself that all the testimony taken at the former trial be received in evidence at this hearing.

"By the Court. All the evidence heretofore taken.

"By Mr. Cummins, counsel for respondent. That is my understanding.

"By the Court. This is but a continuation of the case and all the evidence heretofore taken is before the court, and now we are to hear additional evidence simply.

"By Mr. Cummins. That is my understanding.

"By Mr. Moran. Very well."

At this portion of the hearing both appellant and respondent offered evidence in behalf of their respective sides, and when all the evidence was in, respondent, pursuant to the stipulation, and by leave of court, filed the second amended return. And appellant *filed a reply thereto*. It is true, objection was made to the filing of said second amended return, but such objection could not overturn the solemn agreement theretofore entered into. And the contention was not made then that this agreement related only to the evidence taken at that time, but that no agreement whatever had been made according to counsel's recollection. So that, in legal effect, the case was tried on the alternative writ, the second amended return, and the reply, as stated, for the sake of brevity, in the opinion.

The other matters complained of in the motion can have no possible effect on the result reached. The motion is, therefore, overruled. All concur upon the point herein discussed but *Johnson, J.*, having dissented from the conclusion reached in the case, is of the opinion that a rehearing should be granted.

Digitized by Google

WILLIAM MALLORY, Respondent, v. R. C. PATTERSON, Appellant.

Kansas City Court of Appeals, November 3, 1913.

1. **JUDGMENTS: Equity: Res Adjudicata.** Where the issues sought to be raised as a defense to a suit brought in this State on a judgment rendered and revived in another State, were raised and litigated between the same parties in an equity suit brought to subject defendant's property to such judgment, the adjudication of such issues in the equity suit is conclusive, not only as to the matters of defense pleaded in such equity suit, but also as to every matter properly belonging to the subject in litigation and which defendant might, by exercising reasonable diligence, have brought forward at the time. And such issues cannot be again raised as a defense to a suit on the former judgment. They have become *res adjudicata.*

2. ———: ———: **Failure to Make Defense.** When one fails to make all the defenses he is called upon by the nature of the proceedings to make, such failure is as effective in a subsequent suit to prevent him from insisting upon them as if they had in the former suit been pleaded and been adjudged adversely to him.

3. ———: ———: **Judgment of Revivor.** An adjudication of revivor is *res adjudicata* as to all matters which were or might have beene set up in the proceedings to revive.

4. ———: ———: **Power of Equity.** If a defense exists at the time judgment is rendered, and could with reasonable diligence have been set up at that time, then even equity will not interfere to destroy the judgment.

Appeal from Jackson Circuit Court.—*Hon. Thos. J. Seehorn,* Judge.

AFFIRMED.

McCune, Harding, Brown & Murphy for appellant.

J. P. Fontron and *H. P. Leavitt* for respondent.

Digitized by Google

TRIMBLE, J.—Plaintiff sued the defendant upon a judgment obtained by the former against the latter in the district court of Douglass county, Nebraska, November 7, 1902. The answer denied the allegations of the petition, alleged a payment of the judgment sued on, and also set up certain things as matters of equitable defense. As there was no evidence on the part of defendant to controvert the allegations of the petition or to show that the judgment sued on was paid, the only question is as to the availability or nonavailability at this time of the things alleged in the answer as matters of equitable defense. The trial court held that these matters, having been once adjudicated in a suit between the same parties in Nebraska, are no longer available as defense to this suit on the Mallory judgment, but are *res adjudicata*. A proper understanding of such ruling requires a statement of the facts underlying the judgment sued on and the defense sought to be interposed.

Sometime in 1887 Mallory was induced by Patterson to buy certain property in Omaha and to give a mortgage thereon for the unpaid purchase money. He did so thinking he was signing notes and giving a mortgage for $2800, but through the fraud and deceit of Patterson the notes were for $3500 and $350 and secured by mortgage aggregating $3850, which fraud was not discovered by Mallory until some time afterward. By reason of which fraud Mallory not only lost the property he had bought but also all that he had paid thereon. Upon discovery of the fraud, he brought suit in the district court of Douglass county, Nebraska, against Patterson, who by this time had indorsed the $3500 note before maturity to an innocent purchaser for value without notice. Patterson appeared and answered, and a trial was had resulting in a judgment in favor of Mallory and against Patterson for $3300, rendered October 29, 1892.

Digitized by Google

During the pendency of this suit between Mallory and Patterson, the owner and holder of the note which had been indorsed by Patterson began foreclosure proceedings on the mortgage securing it, and in this suit a judgment was rendered for the full face of the note and interest and the mortgaged property was ordered sold. This was done and the proceeds were applied upon the foreclosure judgment, and the court on December 20, 1893, rendered a deficiency judgment against Mallory and Patterson for $2519.87. On May 1, 1894, Patterson paid the holder of this judgment the amount thereof, but, instead of having it released, had an assignment of the judgment made to his wife, M. B. Patterson. He says he did this so Mallory could not contend the judgment had been paid.

On April 27, 1896, Mallory brought a suit in the district court of Douglass county, Nebraska, in the nature of a creditor's bill, seeking to have certain deeds which Patterson had made to his wife set aside as being in fraud of creditors, and asking that the property be sold and the proceeds applied toward the payment of the judgment held by Mallory. To this Patterson appeared and filed an answer *in which he set up the deficiency judgment* in foreclosure heretofore referred to, *and asked that it be offset against Mallory's judgment.* At this time he was still the holder of the $350 note above mentioned and could have pleaded that Mallory had not paid it, and could have asked to have the amount due Mallory credited with the amount of said note. Upon the issues raised a trial was had, and the court found that the deficiency judgment rendered against Mallory and Patterson had been paid by Patterson, that the same was discharged and did not constitute a set-off and was not a claim against Mallory. The court also found that the deed from Patterson to his wife was without consideration and was made to hinder and defraud his creditors,

Digitized by Google

and thereupon set the deed aside and ordered the property sold and the proceeds applied on the Mallory judgment. This was done, and the Mallory judgment was credited with the sum of $2480.74. This still left an unpaid balance on the Mallory judgment. And on July 14, 1902, just before it would have been outlawed Mallory brought a suit to revive same in the district court of Douglass county, Nebraska. Patterson appeared and *filed answer asking that it be not revived for the reason that it was procured by fraud.* On July 24, 1902, the court heard the case and revived the judgment against Patterson for $2964.03. It is upon this judgment that Mallory now sues.

Patterson's defense is that, as the original judgment obtained by Mallory included the sum of $700 (by which amount the $3500 note he was fraudulently induced to sign exceeded the $2800 he really owed), which sum of $700 Mallory has never paid and never will have to pay, therefore, said sum of $700 with interest from August 10, 1888, should be credited on said judgment now held by Mallory; that said original judgment in Mallory favor also included the $350 note he was fraudulently induced to sign, and that as he has never paid, and will not now have to pay, said note, therefore, it, with interest from September 19, 1892, should be credited on said judgment now held by Mallory; and that the deficiency judgment rendered against Mallory and Patterson in the foreclosure of the mortgage given by Mallory, which deficiency judgment was assigned to Patterson's wife, should be enforced against Mallory and offset against any judgment held by him.

To this defense Mallory replied setting up the fact that in the suit in the nature of a creditor's bill brought by Mallory against Patterson and his wife, herein above referred to, the identical matters as to the deficiency judgment were set up by them and litigated and were decided adversely to them, the court

Digitized by Google

finding that said deficiency judgment had been paid and that it was not a valid claim against Mallory. This deficiency judgment covered the $700 contended for by Patterson. The reply also stated that as to the $350 note, all facts relating thereto were known to defendant prior to the rendition of the judgment sued on, and that by said judgment all such matters or claims, if any, were fully adjudicated against defendant. As heretofore stated, the trial court held that they were *res adjudicata,* and rendered judgment for the full amount of the balance due on the judgment sued on. The defendant Patterson has appealed.

It will be observed that the issues sought to be raised now by Patterson as to the $700 and the deficiency judgment (which are really one and the same, since the deficiency judgment includes the $700), are the same issues raised and litigated by him in defending the creditor's bill brought by Mallory in Nebraska; and that all the issues now sought to be raised by him, as to fraud in obtaining the original judgment, were raised by him and litigated in the suit in Nebraska to revive the former judgment. And that while Patterson did not say anything then about the $350 note, yet, as it was in his possession and he knew all the alleged facts in reference thereto, it was within the issues involved between the parties, and he could have pleaded it as a defense. And having failed to do so, the judgment rendered against him is conclusive not only as to the matters of defense pleaded but also as to every matter properly belonging to the subject in litigation, and which he might, by exercising reasonable diligence, have brought forward at the time. [Donnell v. Wright, 147 Mo. 639; Spratt v. Early, 199 Mo. 491, l. c. 501.]

As to the $350 note, defendant could have returned or offered to cancel it when he was first sued by Mallory. He had it then and has always had it, and so

Digitized by Google

stated in his testimony. Having failed to set it up then as a defense, it has become an adjudicated matter. If it was not adjudicated then, it could have been set up as a defense to the creditor's bill suit brought by Mallory, and being available as a defense thereto, was then adjudicated if it was not before. Again, when Mallory brought suit in Nebraska to revive the judgment he had obtained, all the matters relied upon here could have been raised then, and were in fact raised since the defense was made that the original judgment had been obtained by fraud, and the fraud alleged was that Mallory had secured the judgment by falsely making the court believe he would have to pay the full $3850 of the notes he had been induced to sign, when as a matter of fact he did not pay them and would never have to pay them. This is precisely the basis on which rests the defense now sought to be raised. So that the judgments rendered in Mallory's favor necessarily negative the facts on which Patterson would have to rely in order to succeed in establishing his defense. For this reason the $350 note is not available as a defense here on the ground that it was an independent claim against plaintiff and, if omitted to be set up in one case, could be used as such in another.

The creditor's bill brought by Mallory resulted in a decree in equity in his favor, and was conclusive of all defenses available to defendant whether they were presented and litigated or not. [23 Cyc. 1200.] When one fails to make all the defenses he is called upon by the nature of the proceedings to make, such failure is as effective in a subsequent suit to prevent him from insisting upon them as if they had in the former suit been pleaded and been adjudged adversely to him. [O'Day v. Meadows, 194 Mo. 588, l. c. 628.] A defendant having pleaded a demand as a set-off or counterclaim to an action brought against him is prevented by the judgment from afterward using the same mat-

Digitized by Google

ter or any part of it as a defense or counterclaim in any subsequent action between them; and if a judgment is found against defendant in his plea of set-off, it finally disposes of the matters so pleaded for the purposes of all future actions between the same parties. [23 Cyc. 1201.] Where a matter, even though not properly pleadable as a set-off, has been nevertheless pleaded as such and no objection thereto was made by the adversary, the adjudication thereon is final. [Thompson v. Wineland, 11 Mo. 243.]

An adjudication of revivor is *res adjudicata* as to all matters which were or might have been set up in the proceedings to revive. [Witherspoon v. Twitty, 43 S. Car. 348; Babb v. Sullivan, 43 S. Car. 436; Greer v. Major, 114 Mo. 145.] If a defense exists at the time judgment was rendered and could with reasonable diligence have been set up at that time, then even equity will not interfere to stay or destroy the judgment. [Carolus v. Koch, 72 Mo. 645.]

Defendant cites us to Loy v. Alston, 172 Fed. 90, but the case is not in point. There, a judgment obtained by one was set off against a judgment obtained by another where the one seeking to enforce his judgment was insolvent. But in that case both judgments were alive and subsisting. There was no question of *res adjudicata* in the case. In the case before us there is a prior adjudication of the matters between the parties in which the deficiency judgment set up by defendant was not set aside by the Nebraska court, but was found to be no longer a valid claim against Mallory, having been paid and discharged.

The case of Lashmet v. Prall, 83 Neb. 732, is cited in support of the view that defendant's deficiency judgment was not available as a defense in Mallory's Nebraska suit to revive, and the claim is made that for this reason the judgment in that revivor suit is not *res adjudicata* now. We do not think this case is in point because the defendant therein did not plead

Digitized by Google

any demand as a set-off or counterclaim to the creditor's bill and hence the judgment of the court therein was not *res adjudicata*. Besides, as pointed out above, in addition to pleading the deficiency judgment to the creditor's bill and receiving an adverse judgment thereon, the defendant in the revivor suit set up fraud in procuring the original judgment, and the fraud alleged was that Mallory had obtained the judgment on the false assumption and promise that he would pay the full face of the notes but did not, and knew that he could not, which is precisely the reasons relied upon by defendant now. Which only goes to show that the issues attempted to be revived now are precisely the same as were raised before and adjudicated adversely to defendant.

The case of Quick v. Lemon, 105 Ill. 578, is also cited in defendant's behalf. It is not deemed applicable to the facts in this case. There it was decided that a set-off to a judgment which might have been pleaded as a defense in the proceeding resulting in the judgment, but which was not set up or pleaded, was not adjudicated, but could be raised in a subsequent suit brought by the judgment creditor against stockholders of the debtor corporation to enforce the judgment against them on their unpaid stock subscriptions. The court held that, in the original suit, the defendant corporation was not bound to plead its set-off, and as it did not, it could do so when the judgment creditor, by a suit in equity, attempted to enforce the collection of his judgment against its stockholders, and at that time, the corporation's claim became a proper subject of set-off if there was equitable ground for relief. But, in the case at bar, the defendant not only pleaded his alleged set-off and defense in the creditor's bill, but also again raised practically the same issue in a different form, namely, by pleading fraud in the procurement of the original judgment when sued in the revivor suit.

Digitized by Google

Other cases are cited but they do not cover or affect the case presented. When defendant appeared and answered to the plaintiff's suit in equity on his creditor's bill, the alleged claims of defendant were properly within the issues involved between the parties, and were raised by him, or could have been raised, and the judgment therein rendered became conclusive. To allow him now in this case to set up the defenses he is here seeking to make is to allow him to again litigate not only the questions and issues litigated in the creditor's bill, but also to again attack the judgment rendered in Mallory's favor upon precisely the same grounds it was attacked in the suit to revive. Defendant contends with much earnestness that it is a great injustice to him not to allow him to again raise these defenses. We cannot tell whether an injustice has been done him or not since we do not know how much loss plaintiff suffered by reason of defendant's original fraud for which plaintiff's original judgment was rendered. But if an injustice has been done defendant it was in the Nebraska litigation and not here. The defenses he seeks here to raise are not merely off-sets or counterclaims against Mallory's judgment, they go directly to the heart of that judgment and seek to destroy it. But, whether they be considered as off-sets and counterclaims or as attacks upon the honesty and validity of the judgment, they have been heretofore adjudicated, and are no longer available to prevent recovery in a suit upon that judgment. The judgment of the learned trial court is affirmed. All concur.

Digitized by Google

CHARLES PASCHE et al., Appellants, v. SOUTH ST. JOSEPH TOWN COMPANY, et al., Respondents.

Kansas City Court of Appeals, November 3, 1913.

1. **TAX BILLS: Street Improvements: Petition for: Authority to Bind Corporate Owner.** The law authorizing street improvements to be made upon the presentation of a petition signed by the owners of a majority of the front feet abutting on the street to be improved does not require the names of the owners to be signed in any particular way, nor that the authority to sign shall appear on the face of the petition, or be shown by any particular kind of evidence. An officer of a corporation must be authorized to sign the petition in order to bind the corporation. He has no authority, by virtue of his office, to bind the corporate owner. The authority to bind, however, does not have to be shown by a formal resolution passed by the board of directors. Authority to sign may be shown by evidence that the Board of Directors had placed all business in the hands of the officer, that he had signed similar petitions for street improvements and the directors knew of it and made no objection thereto. In fact, the authority to sign may be shown by any evidence that would be sufficient to show authority in the agent to do any other act which he could not do merely by virtue of his office.

2. ———: ———: **Evidence: Burden of Proof: Whether Signed by Owners of Requisite Number of Front Feet.** Where the petition for the improvement states that it is signed by the owners of the requisite number of front feet, and the municipal authorities have so found and have acted on the petition on its merits, such record is not conclusive on this point, but it is prima facie evidence of such fact, and throws the burden of proving that the petition was not so signed upon the party who asserts that fact.

3. ———: ———: ———: ———. In this case the evidence offered to show that the officer signing the corporate name to the petition did in fact have such authority as would and did bind the corporation, is reviewed and *held* sufficient to bind it.

Appeal from Buchanan Circuit Court.—*Hon. Wm. D. Rusk,* Judge.

REVERSED AND REMANDED (*with directions*).

Digitized by Google

Culver & Phillips for appellants.

Broaddus & Crow for respondents.

TRIMBLE, J.—This is a suit upon two special tax bills issued against two lots respectively in the South St. Joseph Town Company's Third Addition to South St. Joseph, for the cost of paving, curbing, and guttering Lake avenue, from Illinois avenue to Alabama street. The judgment below was for defendants and plaintiffs appealed. The two lots are owned by the defendant Ruth E. Brady; and the defendants, the South St. Joseph Town Company and A. L. Thompson have some interest in them.

It is conceded that plaintiffs are entitled to recover upon both tax bills unless the one defense interposed by the defendants shall prevail. That defense is that the petition presented to the board of public works, praying for the improvement and selecting the materials therefor, was not signed by the resident owners of a majority of the front feet of the property abutting upon the improvement. The strength or weakness of that contention depends upon the sole proposition whether the signature of the South St. Joseph Town Company by E. M. Lindsay, its secretary and treasurer, was a signing by said company of said petition. If the signature of said company as owner of 1023.25 feet should be stricken off and that number of feet not be counted, because the signature was not authorized in such way as to bind the company, then said petition was not signed by the owners of a majority of the front feet of the property abutting on the improvement, and the tax bills are, in that event, void because, in such case, the city had no jurisdiction or power to authorize the improvement or levy the special tax bills.

The trial court made, among others, the following finding of fact (which is the only one now material to the consideration of this appeal), to-wit:

Digitized by Google

"The court further finds that the South St. Joseph Town Company has been incorporated for about twelve years, and shortly after its incorporation and before Mr. Lindsay signed the petition asking that the improvement be made, the board of directors at a meeting or meetings of the directors instructed and directed John Donovan, president, and Ernest Lindsay, secretary and treasurer of the South St. Joseph Town Company, to attend to all business of that company, the practical management of all of the company's business being placed in Mr. Lindsay's hands. The directors were nonresidents of the State of Missouri, excepting Mr. Lindsay and Mr. Donovan and Mr. Van Vliet, and for that reason they left the transaction of all business of the company to Mr. Donovan, president, and Mr. Lindsay, secretary and treasurer. After the property of the South St. Joseph Town Company was taken in the corporate limits of South St. Joseph, and before the petition referred to was signed, there came up before the board of directors a great many matters of business in which the company was interested; sewers, water mains, gas mains, street improvements, sidewalks, grading, water connections and many other things, and all of these matters were brought to the attention of the directors of the company by Mr. Donovan, and the instructions of the board of directors were that Mr. Donovan as president and Mr. Lindsay as secretary and treasurer should handle and attend to all of these things for the company, and thereafter they did attend to all of these matters. Mr. Lindsay as secretary and treasurer, usually, and Mr. Donovan, sometimes, signed the petitions asking for the improvements of all the streets abutting upon the property of the company which were improved, and the board of directors knew that Mr. Lindsay was actually transacting all the business of the company, including the business of causing the streets in the addition owned by the comapny to be

Digitized by Google

improved. Each year the board of directors ratified everything Lindsay and Donovan had done during the preceding year. They handled all of the business of the company of every kind and description with the knowledge of the board of directors. The board of directors met once a year and elected officers. That is about all the business that the board of directors themselves transacted, the entire management and control of the property being left with Mr. Donovan and Mr. Lindsay. When the petition for the improvement of Lake avenue came up, Mr. Donovan and Mr. Lindsay agreed that Mr. Lindsay should sign the petition for the company, and Mr. Donovan directed Mr. Lindsay to sign, and he did sign it for the company."

Thereupon the trial court held that as the board of directors of the South St. Joseph Town Company had not passed any resolution especially relating to Mr. Lindsay's authority to sign petitions for street improvements, or specially authorizing him to sign this particular petition, the name of said company as owner of 1023.25 feet should not be counted, and thus the number of feet represented by the owners on the petition fell below the number required to make a majority.

The question thus presented is: Did the secretary, when he signed the town company's name to the petition, have sufficient authority to bind the company? This involves also the question when a managing officer of a corporation signs the corporation's name to a petition for a street improvement, how must his authority to do so be shown in order to bind the company? The statute authorizing the petition does not require the names of the owners to be signed in any particular way, nor that the authority to sign shall appear on the face of the petition, nor does it provide that the authority to sign shall be proved or established by any particular kind of evidence. If, therefore, the secretary has such authority to sign the pe-

Digitized by Google

tition as would bind the corporation if it were in any other matter of ordinary contract, then the company should be bound in the improvement proceeding. And, if the corporation itself is bound, certainly Ruth E. Brady, the owner of the particular lots in question, cannot complain especially since she as owner of said two lots also signed the petition for the improvement; and in said petition it is alleged that the owners constitute a majority of the front feet.

The board of public works found that the petition was signed by the owners of the necessary majority of the front feet. Of course, its finding is not conclusive, but may be inquired into. However, as the statute does not require the corporation's name to be signed by any particular officer, nor that such officer's authority to sign should appear on the face of, or be attached to, the petition, the finding of the board that the owners of a majority of the front feet had signed it, establishes, prima facie, that the town company's name had been signed so as to bind the company, and throws upon the defendants the burden of proving that the company was not so bound. In Hudson Co. v. City of Bayonne, 54 N. J. Law, 293, l. c. 296, the proceeding was attacked upon the ground that a signature on the petition was not authorized, or was not the signature which it purported to be, and the court said: "The circumstance that the body to whom it was presented has acted upon it as genuine, is prima facie evidence that it is what it purports to be." In that case the signature disputed was "Elizabeth Wilkinson, per J. W. Heck, Attorney" and while the court held that such signature should not be counted, such holding was on the ground that "no authority whatever" was in Heck to sign, as the evidence showed that he had never said anything at all to her about the matter. In State ex rel. v. Nelson, 57 Wis. 147, it was held that as the petition stated that it contained the requisite number of qualified signers and

Digitized by Google

the board acted upon the petition and disposed of it on the merits, this was sufficient to cast the burden of showing that it was not so signed upon the party who asserts it.

The defendants in this case contend that they maintained that burden of proof by showing that there was no resolution adopted or passed by the board of directors of the town company specifically authorizing Lindsay, the secretary and treasurer, to sign petitions for street improvements, or to sign this particular petition, and by showing that at the time Lindsay signed the petition the board of directors did not know that the particular street in question, Lake avenue, was being sought to be improved. And the trial court held with defendants on that contention. But does the authority to sign for and thereby bind the company have to be shown in any such way? In the absence of any particular requirement by the statute, cannot the authority of this officer, Lindsay, be shown in any way that would bind the corporation as in the case of any other act done by an agent? In Sherman v. Fitch, 98 Mass. 59, l. c. 64, it is said: "Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals." In the case of Allen v. City of Portland, 58 Pac. 509, it was sought to have a special assessment for a street improvement declared void. The ground of the attack was that the petition for the improvement did not contain the names of the owners of one half of the abutting property. To maintain this charge it was necessary that the name of the Oregonian Publishing Company should be declared not properly signed thereto. The signature in question was thus: "Oregonian Publishing Co. by H. L. Pittock, Sec'y." It was contended that Pittock had no authority to sign the petition for the company. The testimony showed that there was no resolution passed by the board of directors au-

Digitized by Google

thorizing the signing, and therefore it was contended that the signing was void. But it was shown that Pittock managed the business of the concern and transacted the entire business thereof, except such as arose out of the usual course thereof and then that it was Pittock's habit to consult with another director, Scott, and whatever they agreed to was carried into execution. Scott was president and Pittock was secretary. At the time of signing the petition, Scott and Pittock had consulted about the matter of the street improvement and had concluded that it would be to the best interest of the company to have the improvement made and, pursuant to this determination, Pittock signed the name of the company. The court held the company was bound.

It would seem that, close as the facts in the cited case are to the case at bar, the latter is much stronger in favor of the validity of the signature than is the former. In it the company was a *publishing* company whose general business had nothing to do with the improvements of streets. In the case at bar, the company is a *townsite* company, whose *very purpose and business* is to lay out and improve additions, build houses upon lots therein and improve the streets thereof, which, of course, would include the *very thing the petition was intended to accomplish.* In other words, when the secretary and treasurer, Lindsay, signed the petition asking that Lake avenue in the company's addition be improved, he was not doing an act involving the company in something entirely foreign to its purpose and business, but was helping to bring about the very object and purpose for which the company was organized. In addition to this, the facts, found to be true by the court in the finding of facts hereinbefore set out, present much stronger reasons for holding the company bound than those in the case just cited, although the facts in the cited case are strikingly similar as far as they go.

Digitized by Google

The petition for the improvement in the case at bar was signed in 1909; the suit on these tax bills was filed in September, 1910, and the case was tried in October, 1911. The court found that the town company had been incorporated *twelve years;* that shortly after its incorporation, and, before Lindsay signed this particular petition in question, the board of directors, at a meeting or meetings of directors, instructed John Donovan, the president, and Lindsay, the secretary, *to attend to all business of the company,* and placed the practical management of *all* the business in Lindsay's hands. The court also found that the directors were nonresidents except three, two of which three were Donovan and Lindsay; that after the company's property was taken into the corporate limits of the city, and before the petition in question was signed, the board of directors had before it a great many matters of business in which the company was interested, such as the construction of sewers, water mains, gas mains, street improvements, sidewalks, grading, etc., and *the instructions of the board were that Donovan and Lindsay should attend to such matters,* and that they *thereafter did* attend to them; that Lindsay usually, and Donovan, sometimes, signed petitions *asking for the improvement of streets abutting upon the company's property,* and that the board of directors *knew this,* and at the end of each year *ratified everything done during that year;* and that when the petition for the improvement in question came up, Mr. Donovan and Mr. Lindsay *agreed that Mr. Lindsay should sign the petition* and at Donovan's direction Lindsay signed it for the company. It would seem that if a corporation can be bound by the acts of an agent, done in the line of the very business for which the corporation is organized, and pursuant to a long course of conduct authorized and acquiesced in by the company, then this company was bound by the act of its agent in this case. And, as we have seen, since there is no legislative

Digitized by Google

requirement directing how the authority to sign such a petition shall be manifested, surely the company ought to be bound in this case the same as in any other.

The petition was signed in 1909 and consequently at the end of that year, as usual, the directors by a general resolution, ratified whatever the two men had done during that year. Even if this resolution, owing to its generality, would not have the effect of ratifying an act *foreign* to the general purpose of the corporation, yet as this act was *in line* with the object, purpose and work of the corporation, it should have such effect. In Day v. Fairview, 62 N. J. Law, 621, the court held that even if the action of an officer of a church corporation in signing a similar petition was defective, it could be, and was thereafter, ratified by the corporation. In the case cited the petition was dated and presented August 14, 1896, and the signing was not ratified until February 11, 1898, but the court held that the ratification related back to the time of the signing of the petition and rendered it as effectual as if the authority in the first instance had been expressly conferred.

In the case of Kansas City, Kansas, v. Cullinan, 65 Kan. 68, it was contended that a proceeding to pave was void because the petition therefor did not have the signatures of the owners of a majority of the front feet. It did not if the signature "Kaw Valley Townsite and Bridge Company by Charles F. Morse, Manager, by authority of the board of directors. Attest, E. E. Richardson, Secretary" did not bind the corporation. The trial court held that it did not because Morse had no authority to sign such petition for said corporation. And it was agreed that neither the charter nor by-laws nor any record of the Kaw Valley Townsite and Bridge Company expressly conferred upon Morse or any other person specific authority to sign said petition or any petition to pave said street

Digitized by Google

or any street; that the subject had never been considered by the board of directors before the petition was presented. Afterwards, however, and after suit was brought to invalidate the tax bills, the board of directors attempted to ratify Morse's act. The Supreme Court refused to decide the case on the question whether this attempted ratification amounted to anything or would relate back to the time of signing the petition, notwithstanding the intervention of the rights of the plaintiff therein, but said that it was a matter of grave doubt whether such retroactive effect could be accorded to an act of ratification in a case like that one. But the court held that Morse *did* have authority, and that his act bound the company because the evidence showed that as the company was a townsite company its object and purpose was to have its streets improved; that Morse had the actual general management and control of the property; that he had previously signed other petitions for similar improvements without objection by the company; and that such facts was evidence tending to show the existence of authority to sign, and was not contradicted or overthrown by proof that the records of the company did not show that he was ever given any "specific authority" to sign that or any similar petition.

In Sparks v. Dispatch Transfer Co., 104 Mo. 531, l. c. 539, it is said: "It is now well settled that, when, in the usual course of the business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business." In Moore v. Gaus & Sons Mfg. Co., 113 Mo. 98, l. c. 106, it is said: "The power of an agent or officer of a corporation to bind his principal is governed by the law of agency, and, where an officer has been permitted to manage all the business of a corporation, his authority to bind it

Digitized by Google

will be implied from the apparent power thus conferred upon him."

The case of City of Sedalia v. Montgomery, 109 Mo. App. 197, decided by the St. Louis Court of Appeals, and the same case certified to and approved by the Supreme Court in 227 Mo. 31, is cited in support of the trial court's ruling. In that case, the Supreme Court adopted and incorporated the opinion of the St. Louis Court of Appeals in its opinion. The only expression in either of said decisions bearing on the point in controversy here, is found in the St. Louis Court of Appeals' opinion, and is as follows: "The officers of the corporate landowners, unless specially authorized by the board of directors, were without power to bind the corporations. [Morse v. City of Omaha, 93 N. W. 734.]" This, however, is no more than a declaration that the officer of a corporation has no authority, *simply by virtue of his office,* to bind the corporation by signing the corporate name either to a petition for or a remonstrance against a street improvement. Of course, if the corporation has in no way conferred the authority on an officer to sign, and there is no evidence showing that it did, or that it knew that he had signed and made no objection thereto but acquiesced therein and ratified the act, then such signing would not bind the corporation. In this Sedalia case, the suit was to enforce the tax bills. Defendants contended that they were void because a remonstrance of a majority of the property owners had been filed against the proposed improvement. Plaintiff replied denying that a majority had remonstrated and showed that some remonstrators had withdrawn from the remonstrance, and that others were not legally entitled to remonstrate. In the course of the trial plaintiff offered to show, in addition to the above facts, that certain of the remonstrators *had not authorized anyone to sign for them.* Defendants did not offer any testimony tending to show that such au-

Digitized by Google

thority did exist but objected to the want of authority being shown, and contended further that remonstrators could not withdraw their names after it was once filed. The trial court decided against the tax bills. The St. Louis Court of Appeals reversed the case, and discussed at great length the many other questions involved in the case; but, on the point here involved, merely made the remark hereinabove quoted, and cited the case of Morse v. City of Omaha, 93 N. W. 734. There was no evidence that there was any authority to sign the names of certain remonstrators, while on the contrary there was at least an offer to prove that such authority in fact *was not given.* It was under these circumstances that the St. Louis Court of Appeals remarked that a corporation could not be bound by an officer in such cases, unless specially authorized. Of course this is an entirely different proposition from the question whether a corporation could not be held bound by the signature of an officer or agent, *if there was evidence to show* that, in any manner, *the officer or agent* in fact *did have such authority.*

So that neither the decision of the St. Louis Court of Appeals nor that of the Supreme Court can be said to decide the point here, where the evidence does show such authority, and the facts disclosing the authority have been established by the finding of the trial court.

In the Morse v. Omaha case (93 N. W. l. c. 738), the name of the "Omaha Security Company by Thomas Brennan, President" was claimed to have been signed without authority. The evidence showed clearly that it was signed without authority of any kind. "The president testified that he signed the name of his corporation upon his own responsibility, without consultation with any of the directors," and there was no countervailing testimony. The trial court held that the corporation was not bound and that the petition was insufficient. The Supreme Court of Nebraska,

Digitized by Google

after reviewing the evidence bearing upon the question of whether he had authority, said: "It is therefore very clear that the finding of the trial court that the petition in this respect is insufficient is fully sustained by the evidence." If a resolution of the board was required to confer that authority on him, and it could not be shown in any other way, why review the evidence going to show that no authority had been conferred in any way before deciding he had no such authority? The court also held that the signing of a petition for a street improvement was not a conveyance or incumbrance upon real estate. Of course, if it were, a resolution of the board might be necessary to make it valid.

In the Morse v. Omaha case, as in the Sedalia case, there was no evidence that the diretcors had authorized the officer in question to transact *all* the business of the corporation or, in fact, *any* of it. Neither of them, therefore, can be said to hold anything more than that the officer signing must have authority to so do, and has no power, by virtue of his office, to sign petitions for street improvements. That the Morse case does not hold anything more than this is shown by the decision of the same court in the case of Eddy v. Omaha, 103 N. W. 692. In that case the trial court had held (following as it thought, Morse v. Omaha, supra), that several corporations whose names were signed to the petition by their presidents were *not* bound thereby because not specially authorized. No express authority was given such officers to sign, but there was evidence showing that as a matter of fact they did have such authority. There was evidence showing they had signed other petitions for similar improvements and that the boards of directors had made no objection thereto and had acquiesced therein until after suit was brought. And because there was such evidence, the Supreme Court of Nebraska held that the corporations *were* bound, and, in

Digitized by Google

construing the Morse case, said (p. 694): "It is contended that the views above announced are inconsistent with the rule established in Morse v. City of Omaha, 93 N. W. (Neb.) 734. We do not so regard it. In that case it appeared affirmatively that the directors had no knowledge that any action had been taken purporting to authorize the improvement on behalf of the corporation. It did not appear that the circumstances were such that they ought to have taken notice that the president had signed for the corporation. The trial court found that the signature of the corporation by its president was unauthorized, and that finding was not set aside by this court." From this it would seem to clearly appear that the Morse case is not authority for the broad contention made by defendants. But that if the evidence shows that an officer has been authorized and directed to transact all its business and he has done so for years, including the signing of petitions for street improvements, with the knowledge of the directors, and year after year all his acts are ratified by the board, then the compand is bound by his act and neither it nor any third party can complain. Cook on Corporations, Vol. 3, sec. 717, speaking of the powers of secretary and treasurer, says: "The secretary of a corporation has no power, *merely as secretary of the company*, to make contracts for it. . . . The corporation may of course, expressly authorize the secretary to contract for it, or it may accept and ratify his contracts after they are made. . . ."

The treasurer of a corporation has no power, *merely by reason of his office as treasurer,* to contract for the corporation. But if the treasurer has been *accustomed* to make certain contracts for the corporation, and the corporation has acquiesced in them, *it is bound by a new contract* of that kind entered into by him."

Digitized by Google

If it be said that the question of whether authority was thus given then becomes a question of fact for the jury, or the trial court sitting as a jury, the answer is that in this case there is no contention that the signing was against the wishes of the corporation or of its directors, nor was there any evidence that it was. Besides, the trial court found the facts existed showing such authority in the manner heretofore indicated, but held that such authority was not sufficient as a matter of law.

It cannot be urged that because the statute resuires the petition for the improvement to be in writing therefore authority to sign such petition must also be in writing. The statute makes no such additional requirement and, therefore, does not change the rule by which an agent may sign the name of his principal to a writing under authority not in writing. [Tibbetts v. Street Ry. Co., 153 Ill. 147.]

In view, therefore, of the evidence in this case showing that Lindsay had such authority to sign the petition as would bind the corporation, we hold that the case should be reversed and remanded with directions to enter judgment for the plaintiffs upholding and enforcing the lien of the tax bills. All concur.

AVERY COMPANY, Appellant, v. T. A. POWELL, Respondent.

Kansas City Court of Appeals, November 17, 1913.

1. **BILLS AND NOTES: Fraud: Evidence to Support.** In a suit on the alleged guaranty of a note, the defendant attempted to set up fraud in obtaining the execution of the guaranty. There was no evidence of a trick, artifice or deception practiced on him at the time. Prior to this he had signed a contract agreeing to guarantee the particular note in question. There was no proof that this contract was obtained by fraud. In the absence of fraud in this first contract, the statement of the

Digitized by Google

agent to defendant, "Here are your notes," meaning the two notes he was to guarantee, and at the same time laying them face downward on the table, was not a fraudulent representation by conduct, and even if defendant could not, by reason of the absence of his spectacles, have seen the date when said note fell due, had he turned the note over, yet, as he said nothing about not being able to read without his spectacles, and did not ask what note he was guaranteeing, nor do anything to ascertain what note it was, but hurriedly wrote his name across the back and went on out of the room, there was no showing of fraud, and such defense must fail.

2. ———: ———: **Negligence.** In the absence of any misrepresentation calculated or likely to mislead, negligence in signing an instrument without knowing or making any effort to know the contents thereof will prevent one from avoiding the contract even though it turns out not to be what he supposed it was. If no fraud is practiced to induce him to refrain from reading it or having it read, his ignorance of the contents is not due to fraud but to his own negligence.

3. ———: **Evidence: Burden of Proof.** Fraud is never presumed. The burden of proving fraud rests on him who asserts it. And while fraud may be inferred when it is a legitimate deduction from all the facts in evidence, yet when a transaction under consideration may as well consist with honest and fair dealing as with a fraudulent purpose, it is to be referred to the better motive.

4. **PLEADING: Answer Setting up Fraud: Not Verified.** When the fraud charged pertains to the execution of the instrument sued on, the answer setting up fraud must be sworn to or it will not be sufficient to put fraud in issue.

Appeal from Callaway Circuit Court.—*Hon. D. H. Harris,* Judge.

REVERSED AND REMANDED (*with directions*).

S. D. Stocks, C. M. Hay and *H. N. Eversole* for appellant.

A. C. Whitson and *J. R. Baker* for respondent.

TRIMBLE, J.—Plaintiff sued the defendant as guarantor of a note executed by I. D. Kemp evidencing one of the four deferred payments on a threshing ma-

Digitized by Google

chine sold by plaintiff to Kemp. The price of the machine was $1050, and, as Kemp was not able to pay any cash at the time of purchase, the above amount was divided into four notes of $262.50 each, one due September 1, 1909, another November 1, 1909, the third September 1, 1910, and the fourth (the guaranty of which is the subject of this suit) due November 1, 1910; all four of the notes being secured by chattel mortgage on the machine.

Prior to the sale defendant had an arrangement with plaintiff's selling agent, that for every sale defendant assisted in making, he was to receive a part of the commission. Consequently when plaintiff's selling agent appeared in defendant's store and asked him if he knew where a machine could be sold, defendant told him of Kemp and went with the agent to see him. On the way, the agent agreed to give defendant fifty dollars if they succeeded in making a sale of the machine at $1050. It was ascertained, however, that Kemp could not pay anything down, and, as the plaintiff company would not sell to him on those terms, as he had no credit, defendant offered to guarantee one-half of the purchase price. The dispute is over which particular half defendant agreed to guarantee. The sale was made in July, 1909, and defendant insists that he agreed to guarantee the one-half falling due that year, namely, the note falling due September 1, 1909, and the one falling due November 1, 1909. Plaintiff contends that nothing was said about which two of the four notes defendant was to guarantee.

The proposition to buy the machine on the terms above indicated with defendant as guarantor of one-half the purchase price was mailed to the plaintiff company for its acceptance. Accompanying it went a statement, dated July 1, 1909, of the financial condition of defendant, signed by him; and also a contract, bearing his signature, stating that, for value received and in consideration of credit being extended to Kemp,

Digitized by Google

defendant would "guarantee the payment of certain of his notes given for the purchase price thereof to the amount of $525, as follows: Note for $262.50 due Nov. 1, 1909; Note for $262.50 due November 1, 1910."

The company accepted the proposed contract and sold the machine to Kemp. When it arrived where it was to be set up and delivered, plaintiff's selling agent had Kemp to execute the chattel mortgage on the machine and the four notes above mentioned, and also had defendant to sign a written contract of guaranty on the back of two of said notes. It is defendant's contention that the agent, by fraud, succeeded in getting him to guarantee the second note, due November 1, 1909, and the last note, due November 1, 1910, when the agreement and understanding was that defendant would guarantee only the *first two* notes falling due the same year and season the machine was purchased. Kemp paid the first note when due, and when the second note fell due, defendant assisted Kemp to the extent of $200 in paying that off. By reason of the payment of the first two notes, defendant insists the contract of guaranty has been fully performed.

The answer pleaded fraud in the obtaining of defendant's signature to the fourth instead of the first note; and, in another count, set up a counterclaim for the fifty dollars commission due him on the sale of the machine. The jury found a verdict for defendant assessing his damages under the counterclaim at $9.97, this being the balance of defendant's commission which, according to all the evidence, had remained unpaid. However, it had been credited upon the note before suit was instituted. So it was only in the event that defendant's charge of fraud was successful, that he would be entitled to this sum on his counterclaim.

There are many points raised and discussed by both sides. In the view which we take of the case, however, it is not necessary to notice more than one

Digitized by Google

or two of them. Stated together as one they are that under the pleadings and the evidence in the case there was no defense to the cause of action stated in plaintiff's petition. The answer was not verified. The fraud charged pertained to the execution of the contract. Hence the execution of the instrument sued on must be adjudged confessed. [Sec. 1985, R. S. Mo. 1909.] And fraud in the execution of the instrument sued on cannot be relied on if the answer is not verified. [Beck v. Obert, 54 Mo. App. 240.] Defendant contends that this rule is not applicable as no objection nor exception to evidence in support of fraud was made on this ground by plaintiff. The record shows there was, also that such objection and exception was preserved in the motion for new trial. However, even if there were no objection nor exception made and saved by plaintiff in the record, still there was ample evidence offered to affirmatively support plaintiff's cause of action, and defendant's evidence showed that none of the facts were disputed except the sole question as to fraud in obtaining defendant's guaranty to the note dated November 1, 1910, instead of to the note dated September 1, 1909. And as to this question of fraud, defendant's evidence is insufficient, as matter of law, to sustain it.

In the agreement of July 1, 1909, by which defendant agreed to guarantee two of the four notes, and upon which plaintiff agreed to sell Kemp the machine. it was stated that defendant would guarantee the note due November 1, 1910, which is the note now in controversy. Defendant does not claim that when he signed this contract he did not have his glasses, nor does he swear that he did not sign the agreement to guarantee. He would not say he did not sign it but only that one of the letters in his name did not look right. True, he says he did not agree *in writing* that day to guarantee any notes but only gave a written statement as to his financial ability. But this alone is

Digitized by Google

no evidence of any fact showing fraud in obtaining his signature to the agreement of that date.

So that on July 14, 1909, at the time the chattel mortgage and four notes were being presented to Kemp for execution, and two of the notes were to be guaranteed by defendant, there was *a written contract* between plaintiff and defendant *specifying that the latter would guarantee the payment of this particular note in controversy.* And, therefore, when the agent laid the two notes down on the table and said to defendant: "Here are your two notes" meaning that they were the two defendants was to guarantee, such statement, in the absence of fraud vitiating the above contract, was true since they were the two notes he had contracted in writing to guarantee. Consequently, in the absence of fraud vitiating the above contract of July 1, there was no element of fraud in the statement of the agent, "Here are your notes." They were the notes called for in the contract of July 1. There was no other act from which fraud could be inferred at the time the notes were guaranteed nor is there any evidence showing fraud at the time the guaranty was signed on the back of the note. Fraud is never presumed. The burden of proving fraud rests on him who asserts it. While fraud may be inferred when it is a legitimate deduction from all the facts and circumstances in evidence, it is never to be presumed, and when a transaction under consideration may as well consist with honest and fair dealing as with a fraudulent purpose, it is to be referred to the better motive. [Garesche v. MacDonald, 103 Mo. 1.]

We have carefully read over the entire evidence offered in support of the contention of fraud, and find none. Defendant was a business man, a storekeeper and, therefore, acquainted with business methods and the means of ascertaining what he was doing when he signed his name on the back of the notes. There is no evidence of any trick, artifice or deception practiced

Digitized by Google

by the agent on him at this time. Neither is there any evidence that the agent was in a hurry or hurried defendant. On the contrary it was defendant who was in a hurry. He was very busy in his store when the agent came for him to sign the guarantee and told the agent so. To this the agent replied that he wanted to get the whole matter closed up so he could go to the little station where the machine was and unload it. He wanted the defendant to go before the notary then, and told him it would not take long. Defendant went to the notary's office. The agent got out two notes and laid them face down on the table and said: "Here are your notes. You can sign your name and go on back to the store if you are in a hurry." The defendant did not have his glasses it is true and probably could not read the fine print on the back of the note in which the guarantee was stated. The date at which the note fell due, however, was on the face of the note, and it is not shown whether he could have read it or not if he had looked. But, assuming that he could not have seen it without his glasses, he did not say anything to the agent about not having his glasses, nor did he ask the agent anything about which note he was guaranteeing. He took absolutely no precaution whatever to ascertain which of the four notes he was writing his name upon, but signed his name twice and went immediately back to his business. It is thus seen that the guaranteeing of the fourth instead of the first note was a result of defendant's own negligence and there is an entire absence of any testimony going to show fraud. The agent practiced no fraud upon defendant by which the latter was induced to refrain from reading or having read to him the notes he was guaranteeing. No misrepresentations were made. It cannot be said that the act of laying the notes upon the table and saying, "Here are your notes," was a fraudulent piece of conduct on the part of the agent because the two were the notes he had contracted in writing to guarantee.

Digitized by Google

There should be real fraud in the opposite party to excuse the failure to know the contents of the instrument. [2 Bigelow on Fraud 526; Fitzgerald v. Fitzgerald, 100 Ill. 385.] In the absence of any misrepresentation calculated or likely to mislead, negligence in signing an instrument without knowing or making any effort to know the contents thereof will prevent one from avoiding the contract. The courts will turn a deaf ear to a man who seeks to get rid of a contract solely on the ground that its terms are not what he supposed them to be. [2 Bigelow on Fraud, 525.] A contract cannot be avoided merely because the person who executed it was ignorant of its contents, if no fraud was practiced to induce him to refrain from reading it or having it read, for in such case his ignorance is due to his own negligence. [14 Am. & Eng. Ency. of Law (2 Ed.) 134.] Persons must exercise at least ordinary prudence in their business dealings. [14 Am. & Eng. Ency. of Law (2 Ed.) 117.] Giving to defendant's testimony the widest and strongest effect there is nothing to show fraud for which the contract ought to be avoided. He knew he was going to the notary's to sign the guaranty and yet did not take his glasses, nor did he mention the fact to the agent that he could not read without them. In a hurry to get back to his own business, he signed the notes on the back without inquiry or investigation. The fact that he guaranteed a note falling due November 1, 1910, instead of one falling due September 1, 1909, resulted from his own negligence, and not from fraud of the other party. Such negligence would prevent his avoiding the contract on the ground of mistake as well as fraud had mistake been pleaded. [2 Pom. Eq. Jur. (3 Ed.), sec. 856.] Since there was a total failure to establish the defense of fraud, whether it be considered in the pleading for failure to verify or in the evidence adduced to support the charge, and a corresponding admission of the facts upon which plain-

Digitized by Google

tiff's cause of action rests, and since defendant is not entitled to recover the $9.97 unless relieved from the guaranty of said note (as that sum has already been credited thereon), the judgment is reversed and remanded with directions to set aside the verdict and enter judgment for plaintiff upon the cause of action stated in the petition and also judgment for plaintiff on defendant's counterclaim. All concur.

EMMA LIVINGSTON, Respondent, v. CITY OF ST. JOSEPH et al., Appellants.

Kansas City Court of Appeals, November 17, 1913.

1. **NEGLIGENCE: Municipal Corporations: Snow and Slush: Footprints.** A city is not liable for the dangerous condition of its sidewalks which comes from snow, which has fallen over a wide extent, partially melting and forming slush which would freeze into uneven surface made by the footprints of pedestrians. But the rule would be different if the slush was by water running across the walk at some definite place.

2. **———: Specific Place in Walk: Water from Hydrant.** A hydrant on property adjoining a sidewalk ran water in the winter time over the premises and down across the walk. It had been in such condition for a great length of time when a snow fell. The water ran into the snow on the walk and made it uneven slush, aggravated by the footprints of pedestrians. This was frozen. A woman attempted to pass over it, when she slipped and fell. It was *held* that this did not make a case for the rule that a city was not liable for the general condition of the entire city, or a large part of it, caused by the elements; but it was distinguishable in that this was a specific place where the dangerous condition existed which could have been readily relieved and the city was liable in damages.

Appeal from Buchanan Circuit Court.—*Hon. C. H. Mayer*, Judge.

AFFIRMED IN PART, REVERSED IN PART.

Digitized by Google

Frank V. Fulkerson, L. E. Thompson, Herman Hess, and Spencer & Landis for appellants

Gabbert & Mitchell for respondent.

ELLISON, P. J.—Plaintiff received personal injury by falling on one of the sidewalks in St. Joseph in front of property owned by that city's codefendants, James and wife. She obtained judgment against all the defendants and they appeal.

The evidence tended to show that plaintiff fell on the sidewalk on Faraon street between Twelfth and Thirteenth at about noon, on the 3rd of January, 1912, and that her fall was caused by ice formed from a combination of water and snow, the water coming from a hydrant on the premises occupied by James and wife. Four or five days preceding her fall, a three inch snow had fallen and on the morning of the day she fell one inch more was added. The water escaping from the hydrant ran off the adjoining premises onto the sidewalk, making a slush at that place and the weather being cold it froze unevenly; some spots being from two to four inches higher than others. The evidence tended to show it was one of those abruptly higher places that caused plaintiff to slip and fall.

Defendant city likens the case to those where the fall of snow being general over the city and freezing and thawing going on, together with the passing of pedestrians, caused footprints to be made in the slush, which, when frozen, would make a rough and uneven surface. But those are cases where the condition, caused by the elements, existed over all, or large parts, of the city, a condition which the city is powerless to prevent and necessarily slow to remedy. The case made by plaintiff is not of that kind. Her case is not where melting snow flowed and froze on the walk from terraces or sloping ground. Nor did she fall in con-

Digitized by Google

sequence of a dangerous condition arising from the elements and which extended over large areas. It is true that falling snow and freezing weather appear as facts in the case, but the controlling feature condemning the city is, that there was an additional cause—a special cause—confined to a small and definite place, which was in the power of the city to remove. That was the flowing hydrant. That fact had a controlling influence in bringing about plaintiff's misfortune. The distinction to be made in these cases is fully considered by the Supreme Court in Reedy v. Brewing Association and City of St. Louis, 161 Mo. 523, approved in Vonkey v. St. Louis, 219 Mo. 38, and we need say no more than to refer to those decisions.

While there was evidence tending to show that plaintiff knew of the conditions of the walk at the place she fell, yet the question of due care on her part, in these circumstances, was properly submitted to the jury. It is not a case which would have justified the court in declaring plaintiff guilty of want of care, as a matter of law.

Complaint is made of the instruction for plaintiff using the term unsafe and dangerous in describing the sidewalk instead of its being "reasonably safe." Whatever inaccuracy or error there is in this was cured by defendant city adopting it in instructions in its behalf.

There was evidence sufficient to submit to the jury the question of the city's knowledge of the dangerous place. The hydrant was shown to have been running water across the walk for a considerable period of time. The season was winter and the city authorities must have known the danger of allowing water, which could have been stopped with slight effort, to flow across a walk, especially after a snow had fallen and laid upon the walk for four or five days.

We are however of the opinion that there was no evidence to support the allegation of the petition as

Digitized by Google

to the defendants, James and wife. The hydrant was one which was opened by turning a valve with a small metal wheel and to open it took the active agency of a person. The evidence wholly failed to sustain the charge and their demurrer to the evidence as against them should have been sustained. The judgment will therefore be affirmed as to the defendant city but reversed as to them. All concur.

CITIZENS STATE BANK OF TRENTON, Appellant, v. NATHANIEL SHANKLIN, Respondent.

Kansas City Court of Appeals, November 17, 1913.

1. **INSANE PERSONS: Judgment: Notice: Collateral Attack.** A judgment of the probate court adjudging a person to be insane which shows that such person was never notified of the proceedings is void, notwithstanding it notes that he was confined in an asylum, and may be collaterally attacked; and the appointment of a guardian is likewise void.

2. **———: Restoration Proceeding.** The fact that an insane person, after several years, is restored and proceedings were then begun in the probate court to have him declared sane and his guardian discharged of which he has no notice and with which the only connection he was shown to have was that he was in court as a witness, is not an admission of the validity of the original proceeding which declared him insane without notice.

3. **———: Guardian and Ward: Expenditures: Collateral Kin.** A guardian of an insane person and the court under which he acts are not so restricted in administrating his estate as is an administrator. The court may authorize expenditures by the guardian, if the estate will justify it, which it is convinced the insane person would have done if in his right mind; and expenditures may be made in some instances for needy collateral heirs.

4. **———: Court's Discretion: Intruding Guardian.** While a guardian, under direction of a proper court, may make expenditures to collateral relatives and otherwise act as the court is convinced the insane person would if he had been in his

Digitized by Google

right mind, yet the instances in which the guardian may so administer the estate are those in which a court with jurisdiction has a supervision over the guardian and in which its discretion will protect the estate, and do not extend to a guardian who intrudes himself into the guardianship.

5. ———: **Intruding Guardian: Accounting: Necessaries.** One who assumes to act as a guardian for an insane person, without a valid appointment, and who makes expenditures in behalf of his ward may have an accounting and be allowed as credits all expenditures for necessaries for the insane person and his family.

6. ———: **Necessaries: Life Insurance Premiums: Children over Majority.** Necessaries for the family of an insane person which a guardian may provide, do not include money given to a married son more than thirty years old; nor to a daughter for medical attention who was over twenty-one years of age and who was living to herself and earning her own living; nor will it include burial expenses for such daughter. But payments of premiums on life insurance taken out by the insane person when in his right mind, are necessaries and should be allowed as a credit to one who acted as guardian under a void appointment.

Appeal from Sullivan Circuit Court.—*Hon. Fred Lamb*, Judge.

AFFIRMED.

D. M. Wilson and *Hall & Hall* for appellant.

J. W. Bingham, O. M. Shanklin, Collier & Robinson and *J. P. Butler* for respondent.

ELLISON, P. J.—Plaintiff's action is set out in a petition containing two counts and is founded on an itemized account. One of the counts is drawn upon the idea that the items of the account were furnished to defendant himself; while in the other, it is stated that the defendant was insane at the time the items accrued and that they were furnished to his guardian. At the close of the evidence in plaintiff's behalf the trial court gave a peremptory instruction to find for defendant.

Digitized by Google

The case is presented practically altogether on the second count. The items are payments made by the plaintiff bank to Hughes as guardian of defendant. These items cover a period of several years, beginning in 1903, and total a sum of $9214,20 credited with $6710.71, leaving a balance of $2503.49, for which judgment is asked. Counsel have divided this gross balance into four claims, viz.:

Amount paid Jimmie Shanklin	$ 195.40
Amount paid out for life insurance	1714.47
Amount paid out for Ida Shanklin	2585.25
Interest at 6 per cent on the different items paid out	1006.37

It was admitted at the trial that defendant "was insane and incapable of transacting ordinary business affairs from November, 1895, until July, 1910, and was in that condition continuously between those dates." The evidence shows, and it is practically conceded, that the probate court of Grundy county declared defendant to be insane on the 11th of March, 1896, after a trial had by a jury, the judgment showing the following on its face:

"Comes now on to be heard the inquiry into the sanity of Nathaniel Shanklin on the information of C. L. Berry, heretofore filed, and it appearing to the court that said Nathaniel Shanklin is now confined in a hospital in the city of St. Louis and unable to attend and be present at said inquiry or be served with notice thereof, it is ordered that said proceedings be held without his presence and without notice being served upon him of said proceedings."

C. L. Berry was first appointed his guardian who, after serving until 1898, resigned and H. J. Hughes was appointed and qualified to succeed him and, as just stated, he obtained the money from plaintiff bank and expended it in various ways, but the particular expenditures over which this controversy has arisen,

Digitized by Google

with interest thereon, are as stated and set out above. The evidence shows that Berry and Hughes each assumed to act as guardian and that plaintiff furnished the money to Hughes for the purposes above stated.

But defendant insists that the proceedings in the probate court adjudging the defendant to be insane, and appointing a guardian are void, since they were had without notice to defendant, as is shown upon the face of the judgment we have set out. This objection to the judgment must be sustained. The statute in force when the adjudication was had authorized the proceeding to be instituted and carried on to judgment and the appointment of a guardian, without notice, if the court placed upon its record "the reason why such notice" was not required. A similar statute was construed and accepted as being a valid enactment in Dutcher v. Hill, 29 Mo. 271, and other cases since. But in Hunt v. Searcy, 167 Mo. 158, the Supreme Court, in an opinion by MARSHALL, J., after expressing surprise that the validity of the statute had not theretofore been questioned declared it to be in conflict with both the Federal and State Constitutions, and that a proceeding in the probate court without notice to the alleged insane party was void collaterally as well as directly. This statute has been allowed to stand since such decision and has been carried into the revision of 1909, section 476. But it must be treated as a void provision and the proceedings had under it in this case declaring defendant to be insane and appointing a guardian for him must be held void, unless they are cured by the following further consideration.

Defendant's mind became restored and he was declared to be sane by proceedings instituted in the probate court. Plaintiff claims that he appeared in that proceeding and thereby recognized and validated the original adjudication of his insanity. In this connection counsel say the whole opinion in Dutcher v. Hill was not overruled in Hunt v. Searcy, and that the lat-

Digitized by Google

ter portion of it, which states that though the proceedings adjudging insanity were "irregular" for want of notice, yet if, after regaining his mind, the party affected came into court and asked to be relieved from the custody of his guardian for the reason that his mind was restored, it amounted to an admission of record that the proceedings against him were valid.

We are relieved from the necessity of saying whether Hunt v. Searcy, should be held to condemn that part of Dutcher v. Hill, from the fact that we do not find the record shows such appearance and admission by the defendant in this case. The proceedings to relieve defendant in this case and to discharge Hughes as guardian were not instituted by defendant, or at his instigation. Nor does it appear that he was served with notice, though the record shows his presence in the court room, but not as a participant in the proceedings. His name appears in the way of recitation that he and eight other persons were in court as witnesses. The most that we can make out of the wording of the record is that he was a witness; and it is recited that the court "after seeing and talking with" him and hearing witnesses, concluded he could manage his own affairs. We do not think such a record shows a recognition of the original proceedings, or that it amounts to a solemn admission that they were valid.

But plaintiff insists that granting there was no valid adjudication of insanity and that the appointment of a guardian was void, defendant is yet liable for the account on the ground that it was for necessaries furnished for himself and his family; and, in fact, plaintiff's petition is based on the ground that it was necessaries which were furnished the guardian.

There being no legal guardian and the proceeding of the probate court being void from the beginning, and plaintiff's petition being confined to necessaries

Digitized by Google

for the defendant, and for his family while he was insane, has made inapplicable much of the authority cited by him. From these we gather that the probate court handling a ward's estate through his guardian, is not tied with legal restraint to the extent that it is when supervising and directing an administrator. It seems the court, if the estate will justify it, may authorize to be done what it is convinced the insane person would have done had he been in his right mind. Thus allowances, in certain circumstances, may be made for support of a bastard child, for collateral kin, for uncles and aunts, for usual contribution to the church; In the Matter of Willoughby, 11 Paige, 257; In the Matter of Heeny, 2 Barb. Ch. 326. In Ex parte Whitbread, 2 Mer. 99, Lord ELDON stated that, "where the father of a family becomes a lunatic, the court does not look at the mere legal demands which his wife and children may have upon him. . . . The court does nothing wantonly or unnecessarily to alter the lunatic's property, but on the contrary takes care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, applying the property in the meantime in such manner as the court thinks it would have been wise and prudent in the lunatic himself to apply it, in case he had been capable.

"The difficulty I have had was as to the extent of relationship to which an allowance ought to be granted. I have found instances in which the court has, in its allowances to the relations of the lunatic, gone to a further distance than grandchildren—to brothers and other collateral kindred; and if we get to the principle, we find that it is not because the parties are next of kin of the lunatic, or, as such, have any right to an allowance, but because the court will not refuse to do, for the benefit of the lunatic, that which it is probable the lunatic himself would have done." While In re Darling, 39 Ch. D. 208, approves that case,

Digitized by Google

it is said that it is not the duty of the court to deal benevolently or charitably with the property of the lunatic and that applications for allowances out of the surplus income of his estate to poor relatives who have no legal claim should be discouraged. And that while the court will do what it is convinced the lunatic himself would have done if sane, yet in making allowances to collateral kindred, it should act "with the utmost jealousy;" that is, with much more circumspection than when dealing with the case of direct heirs, who, it seems, may be required, in certain contingencies, to give receipts as for sums in the nature of advancements.

But the foregoing cases concern legal guardians duly appointed by the probate court and who have acted by the direction of the probate court. While in this case we have no valid appointment of guardian and no action of a court with jurisdiction. In those cases there was action by courts intrusted by law with the duty to investigate and with a discretion to authorize expenditures beyond mere necessaries. What difference should this make in the rights of the parties where the question concerns necessaries?

In Gilfillens Estate, 170 Pa. St. 185, the grandfather of an infant, deaf, mute child, conceived himself to be her guardian, though he was never appointed. He expended her whole estate for her education through her sense of sight, and succeeded in giving her great relief against her sore affliction and making her contented in a plight which otherwise would have left her without happiness. The self-constituted guardian died and an effort was made to have his estate account for the money he had used. The case was taken to the Supreme Court of Pennsylvania, where it was held to be manifest that the expenditure in the behalf it was made would have been entirely proper and would, without doubt, have been sanctioned by the proper court; if a legal guardian had presented his application to

Digitized by Google

such court for permission to so expend it. And that no different rule ought to be applied to a case where there was no appointment of guardian, if one had acted as such in point of fact, and had faithfully discharged his trust. In Newberg v. Bickerstaffe, 1 Vern. 296, it was said that "if a man intrudes himself upon an infant, he shall receive the profits, but as guardian; and the infant shall have an account against him, as against a guardian." To the same effect, see Davis v. Harkness, 6 Ill. 173, 4 Paige, 64.

Applying the foregoing law to the instance of a guardian of an insane person (and we discover no distinction) we can see where defendant could have demanded an accounting of Hughes, and that the latter could have brought in, as credits, all proper expenditures which he may have made for the preservation of the estate and for necessaries for the family. That being true, it would follow that if the balance were in favor of the guardian he would be allowed a judgment for such sum.

Now assuming that this action is properly brought against defendant as the restored insane person, instead of Hughes the self-constituted guardian, we will proceed to inquire whether the four items conceded as making up the account as necessaries. First is the item of $195.40, paid to James Shanklin, a son and a man of family over thirty years of age, who was moving to California and the money was for tickets, clothing, etc. It seems that James owned a piece of property which the guardian bought of him and then sold. And the payment to James when he started West was on that account. It is so involved, or at least is so indefinitely explained that we find it difficult to understand. But, however, it may be, it is incomprehensible how it could be considered "necessaries" for defendant's family.

The next item is for $1714.47; this was for premiums for keeping up life insurance which had been

Digitized by Google

taken out in different companies and insurance orders by defendant while sane, and we think it should be allowed. It can be very well denominated a necessary in the circumstances of defendant's insanity and the complicated and uncertain condition of his estate. It was paid by Hughes in good faith and for a proper and necessary purpose.

The next item is $2585.25 for Ida Shanklin and includes items of expense incurred during a protracted sickness and at her death. But she was past her majority, perhaps twenty-five years of age, and had been from home earning her own living for several years. Many of the items doubtless would have been necessaries as against her and her estate, but not so as against her insane father's estate. The act of Hughes in making these payments was not in discharge of any obligation owing by defendant. In Rodgers on Domestic Relations, sec. 494, it is said that in the absence of an agreement, "it is the rule, therefore, that when the child arrives at the age of twenty-one years or other age fixed by law, when the majority is attained the duty of the parent to support, whether the child be male or female, is at an end. The poverty or wealth of the child does not, in any sense, alter the rule. The duty of support by the parent ceases absolutely upon the arrival of the child at majority. So a parent is not liable to a third person who furnishes necessary medical attention to his adult child in sickness, and this is true though the child be sick at the house of the parent at the time and be actually living with his father as a member of his family. Nor is the father liable for clothing actually necessary, where furnished after the majority of the child." To the same effect is Brower v. Supreme Lodge, 87 Mo. App. 614; 2 Kents Com. 191, 192; Blachley v. Laba, 63 Iowa, 22. The authorities cited by plaintiff do not controvert these propositions; they are not applicable to the evidence here which shows the age, occupations and resi-

Digitized by Google

dences of the persons to whom it is claimed necessaries were furnished. The next item is $1006.37 charged in gross for interest on the various sums advanced to Hughes through a series of years. No sufficient showing was made by the evidence to justify an allowance of that amount. But we understand the only interest insisted upon now, is upon these items of account we have discussed, since the institution of this action, and as that could only be allowed on valid claims, there would be no interest under our conclusions, except on the insurance item, and as that would make no difference in the result at which we have arrived, it need not be calculated.

By reference to our statement of the account at the outset, it will be seen that by disallowing as charges the three foregoing items aggregating $3787.02, we reduce the debtor side of plaintiff's whole account to $5427.22, and as this is less than the credit entered by plaintiff, of course there is nothing owing to it.

The judgment is affirmed. All concur.

PEARL COBY, Appellant, v. QUINCY, OMAHA & KANSAS CITY RAILROAD COMPANY, Respondent.

Kansas City Court of Appeals, November 17, 1913.

1. **NEGLIGENCE: Humanitarian Rule: Railroad Crossings.** The plaintiff sued to recover damages for personal injuries sustained in a collision between the automobile in which he was riding and the defendant's railroad train at a crossing on Franklin street near the defendant's station in Kirksville. When he approached the crossing the driver of the automobile was going at the rate of four or five miles per hour and he failed to observe any train coming until he was within ten or twelve feet from the main track. The train was then about sixty feet away traveling at the rate of twenty miles per hour. It struck the automobile and plaintiff was injured. *Held*, that the plaintiff was not entitled to recover under the humanitarian doctrine.

Digitized by Google

2. ———: ———: ———. In order for the humanitarian doctrine to be applicable the traveler must not only be in actual peril but his peril must be apparent to one in the position of the operator of the threatening instrumentality while in the exercise of ordinary care and diligence.

Appeal from Adair Circuit Court.—*Hon. Nat M. Shelton,* Judge.

AFFIRMED.

C. E. Murrell and *Alex Doneghy* for appellant.

J. G. Trimble and *Campbell & Ellison* for respondent.

JOHNSON, J.—Plaintiff was injured in a collision between an automobile, in which he was riding as a guest, and a train running on defendant's railroad. The place of the collision was where the railroad crosses Franklin street in the city of Kirksville. This street runs north and south, and is much traveled. Defendant's passenger station is just west of the street and is on the south side of the main railroad track. Three switch tracks diverge from the main track at a point about one hundred and fifty feet east of the street and run westward across and beyond it. The first of these tracks is about thirty feet south of the main track and the last about thirty feet further south. The railroad runs over a long trestle bridge the west end of which is from 350 to 400 feet east of Franklin street. A westbound train, consisting of a locomotive, nine freight cars and two passenger coaches, struck the automobile which was running north on Franklin street and plaintiff who was riding in the seat with the driver was thrown out and severely injured. For some reason plaintiff did not offer himself as a witness and we must look to the testimony of the driver for the principal facts on which he relies for a recovery.

Digitized by Google

The petition charges that the injury was caused by negligence of defendant in failing to give statutory signals as the train approached the crossing, in failing to provide the locomotive with a proper headlight, in running the train in excess of seven miles per hour, the maximum speed allowed by a city ordinance, and that the injury was caused by a negligent breach of the duty defendant owed plaintiff under the humanitarian or "last chance" rule. The answer contains a general denial and the allegation that plaintiff was a minor at the time of the commencement of this suit and, therefore, was not competent to maintain the action. At the conclusion of the evidence introduced by plaintiff, defendant asked a peremptory instruction which was refused. Defendant offered no evidence, the case was submitted to the jury on the evidence of plaintiff and the jury returned a verdict for defendant. Plaintiff appealed and complains of the instructions given at the request of defendant as being equivalent to a demurrer to the evidence. The answer of counsel for defendant is that the evidence of plaintiff failed to make a case to go to the jury and that its request for a demurrer to the evidence should not have been overruled for the reason that plaintiff is shown to have been guilty in law of negligence that contributed to his injury.

Plaintiff, a young negro of no particular vocation, was invited by the driver of an automobile, a liveryman, to accompany him on a trip to a near-by town. The invitation was prompted partly by the selfish motive of having a willing and able helper should tire or other troubles be encountered on the trip. They left the public square at 9:40 in the evening and drove north on Franklin street to the crossing in question which is seven blocks from the public square. They knew the westbound train was overdue and might arrive at any moment. Hacks, express wagons and other vehicles were standing at the station just west of the street

Digitized by Google

waiting for the arrival of the train. As it approached the crossing the speed of the car was reduced to four or five miles per hour and without stopping it proceeded over the crossing at that speed. Houses and other obstacles on the east side of the street shut off their vision in that direction until they came to a point ten or fifteen feet south of the south switch track and about seventy feet south of the main track on which the train approached. There was a break in the obstructions at that point for a distance of fifteen feet or more that afforded a clear view of the track for a distance estimated by Carothers, the driver, as being 700 or 800 feet east of Franklin street and about 100 feet east of the long trestle bridge. The driver states he looked eastward while traveling by that open space and listened but saw and heard nothing of the train. Then his view was shut off by two freight cars standing on the first switch track, a telephone pole and a pile of lumber, and he could not see eastward until he reached a point ten or twelve feet south of the main track. Then he saw the locomotive about sixty feet away advancing at a speed of twenty miles per hour. The front end of his car at that moment was from four to six feet from the track and as the car could not be stopped in a place of safety, the driver swerved to the left in the hope of being able to avoid the oncoming engine. The movement was unsuccessful and the collision followed. During all this time plaintiff sat in the front seat without making an effort to escape though there was no door or other obstacle to prevent him from stepping to the street and the speed of the car would not have been a serious hindrance to such attempt. The locomotive carried a headlight but the driver and another witness say that it was dim and cast no glare along the track. There is some evidence to the effect that aside from giving the station whistle the engine gave no signal by bell or whistle of its approach. A witness who lived southeast of the cross-

Digitized by Google

ing and about five blocks from the railroad testified that she plainly saw and heard the train, did not see a headlight and heard no bell. We quote from her testimony:

"Q. What part of the train did you see? A. Well, I saw all of it, where the headlight ought to be, but I didn't see no light there.

"Q. You could see the engine? A. I could and the coal car and all of the freight and passenger, too.

"Q. Was that a very dark night? A. It wasn't so very dark I didn't think.

"Q. It was light enough that four blocks you could see and did see the engine? A. I sure did.

"Q. Did you hear it running? A. I heard it running before I knowed it was coming; I didn't hear any whistle or bell.

"Q. You could hear it running before you saw it? A. Yes, sir.

"Q. How far away were you from the train at the time you heard it running? A. I suppose about five blocks.

"Q. You heard it for about a block before it came in your sight? A. Yes, sir.

"Q. Did you hear it when it ran over that trestle just east of Franklin street crossing? A. I heard it till it got to town."

The night was an ordinary summer night unmarked by any unusual weather conditions. The train was about five hundred feet long. There is no direct evidence that it ran faster than twenty miles per hour within the distance of 700 or 800 feet from Franklin street. The engineer may have begun to slacken speed preparatory to stopping at the station and we shall concede for argument, though there is no evidence of the fact, that the train was running faster than twenty miles per hour at the time the automobile passed the open space near the south switch track. But had it been running at thirty miles per hour, which is as

Digitized by Google

fast as one would think a mixed train would be running under all the circumstances disclosed, the locomotive could not have been more than 400 feet from the crossing and it and nearly all of the train were within the range of vision afforded the occupants of the automobile by the open space and certainly within their hearing. It will not do for plaintiff to contend that the train was not within sight and hearing. The indisputable facts show that it was and we are not bound to accord any weight to testimony that is opposed by evidence so conclusive.

There were other lights in the engine and train besides the headlight and the occupants of the car occupied a position as advantageous as that of plaintiff's witness who saw the train at a much greater distance and who heard it before it came into sight. This heavy freight train, rumbling over a trestle and only four hundred feet away, made a noise that could not have escaped the hearing of an attentive person in the position of plaintiff. We shall assume that both occupants of the car saw it and heard it when they were sixty or seventy feet from the main track and in a place of safety. It is true, as argued by counsel for plaintiff, that a traveler approaching a railway crossing in a city has a right to presume that a train will not be run to and over the crossing at speed in excess of that allowed by the city ordinances, but it does not follow that the occupants of the automobile were justified in shutting their eyes and ears after discovering that the train was approaching and in blindly assuming that it would not be run faster than seven miles per hour and at such speed would give them ample time to cross in safety. The duty of a traveler about to cross a railway to use his senses for his own protection is a continuing duty. To be reasonably careful he must be attentive until he has passed through the zone of danger. Presumptions must give way to actual facts and knowing, as they did, that a

Digitized by Google

train was coming, was near the crossing and, obviously, running at an excessive rate of speed—for its appearance and noise proclaimed that fact—the occupants of the automobile indisputably appear to have proceeded to the crossing in a manner clearly negligent. They neither stopped nor checked speed but after passing the open space ran on behind obstructions to sight and sound into the very teeth of danger, blindly relying on the chance that they would beat the train to the crossing. Their negligence is so apparent that we must declare as a matter of law that plaintiff, who was in a position to avoid the injury, even if the driver had refused to stop at his request, was as negligent as the driver and that his negligence must defeat his action, unless the evidence discloses that defendant was guilty of a breach of a duty it owed plaintiff under the humanitarian rule. Obviously the peril of plaintiff did not and could not have become known to the enginemen until the automobile emerged from behind the pile of lumber and nothing then could have been done by them to avert a collision.

The weakness of plaintiff's position under the last chance rule has led counsel to urge that the strong light cast ahead by the automobile must have been visible to the engineer at a distance that would have enabled him to prevent a collision. Considering the fact that the engineer had other lights before him, the headlight of his locomotive, street lamps and lights in and about the station, it would be speculative in the extreme to say that he could have distinguished the light from the automobile. But if he could have done so it would be absurd to hold that he should have anticipated that the light emanated from a vehicle that was on the point of being negligently run from a place of safety in front of the train. Cabs, wagons, motor cars and other vehicles brought to the station to meet trains generally came from the south on Franklin street almost to the crossing and were there turned in or

Digitized by Google

backed into the station. A vehicle light thrown across the track suggested nothing more than the approach of the vehicle from the south and carried no warning or intimation that its driver was in any sort of peril. To bring the last chance rule into play the traveler must not only be in actual peril but his peril must be apparent to one in the position of the operator of the threatening instrumentality while in the exercise of ordinary care and diligence.

We hold that the injury was the result, in part, at least, of plaintiff's own negligence and that the evidence affords no ground for the application of the humanitarian doctrine.

The learned trial judge would have been justified in sustaining the demurrer to the evidence and in this view of the case the errors assigned by plaintiff are immaterial.

The judgment is affirmed. All concur.

LEON F. FIFE, Appellant, v. THE CHICAGO & ALTON RAILROAD COMPANY, Respondent.

Kansas City Court of Appeals, December 1, 1913.

1. **DAMAGES: Railroads: Public Road Crossings.** This is an action instituted by the plaintiff to recover damages to his horse and buggy by a collision with the defendant's railroad train. A servant of the plaintiff and two companions were driving plaintiff's horse and buggy home from the county fair, when they fell asleep, and, while still asleep, the horse approached the defendant's railroad crossing near a station called Steinmetz. The defendant's freight train, cut in two to leave the crossing open, was standing there, and, as a passenger train approached, the crew closed the gap, preparing to follow the passenger train. The horse went on the track in the path of the coming passenger train, was killed and the buggy wrecked. *Held*, that there was no prejudicial error to the plaintiff at the trial.

Digitized by Google

2. **INSTRUCTIONS: Evidentiary Issues.** When facts are indisputably established, that the statutory crossing signals were given by the engineer of the passenger train, it was not error to restrict the jury's consideration of the case to evidentiary issues.

3. **———: Assuming Facts as Proved.** An instruction which assumes as a proved fact that the damage to plaintiff was caused by negligence of defendant concurring with negligence of the servant of plaintiff, was properly refused.

Appeal from Howard Circuit Court.—*Hon. A. H. Waller,* Judge.

AFFIRMED.

S. C. Major and *J. H. Denny* for appellant.

Don C. Carter for respondent.

JOHNSON, J.—A passenger train operated by defendant collided at a public road crossing in Howard county with a horse and buggy owned by plaintiff and this action is to recover the resultant damages on the ground that they were caused by negligence of defendant. The petition alleges "that the tracks of defendant, consisting of main track and a sidetrack, are laid across a certain traveled public highway in said county leading from the city of Glasgow to the town of Armstrong in said county, near defendant's station at Steinmetz station on said railroad; the tracks at said crossing being on the same grade as said highway; that on the 18th day of August, 1911, while a certain horse and buggy belonging to plaintiff was lawfully passing along and upon said highway at the point of crossing of defendant's tracks as aforesaid, the agents and servants of defendant managing said railroad and in charge of its trains thereon, so negligently, carelessly and unskillfully conducted themselves that a certain locomotive and train of cars then and there in charge of the agents and servants of de-

Digitized by Google

fendant were by reason of the negligence, unskillfulness and want of care of the agents and servants of defendant, with great force and violence driven and run upon and against said horse and buggy of plaintiff, and plaintiff's horse, buggy and harness, of the value of three hundred and sixty dollars, were thereby wholly destroyed."

The answer interposes a general denial and a plea that negligence of the agent of plaintiff in charge of the horse and vehicle contributed to the injury. A trial of the issues in the circuit court resulted in a verdict and judgment for defendant. Plaintiff appealed.

The facts of the case are as follows: Plaintiff, a farmer living about two and one-half miles north of the crossing in question and about twelve miles from Fayette, lent a horse and buggy to one of his servants, a young man named Schafer, who desired to spend the day at a county fair being held at Fayette. On his way to the fair Schafer stopped at an intermediate town and had a tire reset at his own expense but did this voluntarily and not at the request of plaintiff. Aside from this incident the evidence shows conclusively that the use of the property by the servant was for his own pleasure and not on his master's business. After spending the day and the first half of the night at Fayette, Schafer started to return home with two companions he had found at the fair and had agreed to take to their homes three or four miles east of plaintiff's farm. All three being intoxicated fell asleep in the buggy and the horse, allowed to take his course, followed the nearest road home. Sometime before reaching the crossing Schafer awoke, discovered that the horse had left the road to the homes of his companions, decided that the young men should spend the night with him and then relapsed into slumber. The next time he regained consciousness he was in Glasgow, one

Digitized by Google

of his companions was dead and the other severely injured.

It appears that the horse being pointed homeward traveled on, keeping in the road which runs north and south until he reached the crossing which is in the country a short distance east of the station at Steinmetz. The railroad, which runs east and west, has two tracks at this place, the main track and the passing track, which is six feet north. Just east of the crossing the tracks curve towards the north. A westbound freight train had been standing on the passing track for several hours before the injury but had been cut in two at the crossing to allow the free use of the public road. Its crew had orders to follow a westbound passenger train due to pass Steinmetz at about three o'clock in the morning and when they saw from the glare cast by its light that the passenger train was coming, they closed the gap in their train preparatory to following it. The movement, of course, obstructed the crossing and when the unguided horse arrived he found his further progress blocked by the freight train. There is a controversy between the parties over the length of time this blockage continued. The brakeman who coupled the two parts of the train states that the passenger train arrived not more than two or three minutes after the crossing was closed and that the horse and buggy were not at the crossing when he coupled the cars. On the other hand witnesses introduced by plaintiff who examined the place after daybreak testified to finding a multitude of hoofprints and buggy tracks from which it well might be inferred that the horse had been at the crossing a long time and had restively worked his way over towards the west side. As to the character of the crossing the evidence shows that the railroad is on a lower level than the wagon road which slopes down to the crossing on each side. The facts are not disputed that the passenger train was late, was running from forty to

Digitized by Google

fifty miles per hour, and that its engine whistled for the station and again for the crossing. The engine carried a powerful electric headlight but the engineer testified that on account of the curve he could not see the crossing and did not become aware of the presence of the horse (he did not see the buggy) until the engine was not over sixty feet from the crossing. A collision was unavoidable but fearing the horse might be thrown back under his train by rebounding from the freight train he immediately applied the brakes and stopped the train in a space of about 600 feet. The three occupants of the buggy were found between the main and passing tracks thirty or thirty-five feet west of the crossing; the body of the horse was also between the two tracks and a few feet west of the bodies of the men. The wreckage of the buggy was scattered along both sides of the main track. It was a starlit summer night, too dark, the engineer states, for him to see anything out of the narrow path of the electric headlight which, because of the curve, did not touch the crossing until the engine was about sixty feet from it. Witnesses introduced by plaintiff, who made tests afterwards, contradict this statement and say that the curve was not so sharp and that the crossing came within the path of the light at a distance of 600 feet.

The instructions given at the request of plaintiff directed a verdict for him on the finding that his property was destroyed "by an engine and train of cars running on said main track and that the agents and servants of defendant in charge of said trains or either of them failed to exercise that degree of care for the safety of the animals or property at said crossing which persons of ordinary care and prudence would exercise under like circumstances, and that in direct consequence of such neglect, plaintiff's said property was destroyed."

The court refused the second instruction asked by plaintiff which is as follows:

Digitized by Google

"If the jury find from the evidence that the property destroyed had been loaned by plaintiff to Schafer and was in the exclusive control of Schafer, then the fact that the property was destroyed on account of the joint or concurrent negligence of both defendant and Schafer will not absolve defendant from liability, but each would be jointly and separately liable."

On behalf of defendant the court gave an instruction similar to that designated as "D. 1," in the case of Schmitt v. Trans. Co., 115 Mo. App. 445, which the St. Louis Court of Appeals approved as "an admirable admonitory charge to the jurors about the spirit in which their duties should be performed and warning them to permit no sympathy or prejudice to influence them." We share this view of instructions of that character and do not agree with counsel for plaintiff that they have a tendency to prejudice or mislead the jury.

Other instructions given at the request of defendant against which objections are urged by plaintiff told the jury (2) "that defendant had a right to couple up the freight train at the time the evidence discloses it did, and you cannot find defendant guilty of any negligence in this respect unless you further find from the greater weight of the evidence that it thereafter blocked the road crossing for a period of five minutes or more before the passenger train collided with the horse and buggy," (3) "that there is no evidence that the crossing signals were not given;" and (4) "that defendant had the right to run the passenger train at the rate of speed as disclosed by the evidence."

The court refused defendant's instruction withdrawing from the consideration of the jury the issue of negligence under the "last chance" rule.

Plaintiff complains of defendant's second instruction on the ground that it erroneously curtailed the duty the law imposed on the operators of the freight train to exercise reasonable care to avoid injuring

Digitized by Google

persons and animals lawfully on the public crossing. In 1911, the Legislature enacted a statute (see Laws, 1911, p. 153) forbidding the occupation of a public crossing by a railroad train or cars for a longer period than five minutes. Under this statute, it would be negligence, *per se,* for trainmen to allow a crossing to be blocked a longer time and it may be conceded, on the other hand, that one of the purposes of the statute was to allow to trainmen the reasonable exercise of the privilege to obstruct a crossing for a time within that specified as the maximum limit and that no negligence could be predicated of a reasonable exercise of such lawful right. The statute, however, was not intended to supersede or impair the common law duty of the operators of trains to exercise reasonable care at public road crossings which means care commensurate with the dangers peculiar to a given crossing. As is said in one case, "Where a railroad crossing is especially dangerous, it is incumbent on the company to exercise care commensurate with the danger." [Railroad v. Gardner, 131 S. W. (Ky.) 787.] In another that the degree of care required of railroads at public crossings depends upon the facts and circumstances of each particular case, and in others that "the fact that a statute may prescribe one precaution will not relieve the railroad company from adopting others, which may be dictated by common prudence so as to safeguard the public using the crossing over its tracks." [White, Personal Injuries on Railroads, sec. 887, p. 1297.]

If the facts and circumstances in the instant case would justify a reasonable inference that peculiar danger lurked at this crossing which should have been known to the crew of the freight train and that the likelihood of such danger being enhanced by any but the shortest possible obstruction of the crossing should have been anticipated, we would hold that the court erred in declaring as a matter of law that the crew

Digitized by Google

had a right to block the crossing for five minutes or for any other time than would be reasonable in view of all the circumstances of the situation. But on the hypothesis that the obstruction had not continued five minutes we perceive nothing in the facts and circumstances disclosed to support an inference of a lack of reasonable care on the part of the crew of the freight train. This was an ordinary country road crossing and there was no apparent reason for the crew to refrain from coupling the train together until after the passenger train, which was known to be at hand, had passed. It would be unreasonable to think they should have anticipated the possibility of a driverless horse straying into a place of danger on the crossing in that brief period. It may be true, as suggested by plaintiff, that when the horse reached the obstruction he was in a trap, but the controlling fact is that he reached that place through the negligence of his intoxicated and unconscious driver after the train had been coupled and under circumstances which reasonable care on the part of the trainmen would not have anticipated. They were entitled, until the contrary fact appeared, to indulge in the presumption that the driver of a horse and vehicle would act with reasonable care in approaching the crossing and would not fall asleep and allow his horse to stand on the crossing in the path of danger. Had the driver been in possession of his senses the crossing signal given by the approaching engine would have given him ample opportunity either to remain in or drive to a place of safety. The horse would not and could not have become entrapped if the driver had performed his duty. Under the facts hypostatized in the instruction we have no hesitation in saying as a matter of law that dedefendant was not negligent in the occupation of the crossing and it was not error for the court so to declare to the jury.

Digitized by Google

Defendant's third instruction was not prejudicial to any right of plaintiff. The fact was indisputably established that the statutory crossing signals were given by the engineer of the passenger train and it was not error to restrict the jury's consideration of the case to evidentiary issues.

Nor do we find error in defendant's fourth instruction. The argument of plaintiff against this instruction is answered in the following quotation from the opinion of LAMM, J., in McGee v. Railroad, 214 Mo. l. c. 541:

"It has always been held by this court that in the country, between stations, away from congested populations, it is not negligence for passenger trains to run at a rapid speed over road crossings. If this long-established and well-known interpretation of the law was not satisfactory to the Legislature, it must be conclusively presumed that it would have taken up the question of rapid transit under the modern demands of commerce and established a legislative rule regulating train speed at country crossings."

There is some question as to whether the court did refuse to give the second instruction asked by plaintiff, but assuming that it was refused, the ruling was proper, since the instruction assumes as a proved fact that the damage to plaintiff was caused by negligence of defendant concurring with negligence of the servant of plaintiff. The existence of such negligence was controverted by defendant and is shown by the evidence to be a question about which there is room for an honest and reasonable difference of opinion. The rule always has been observed in this State that the court cannot assume in instructions to the jury the existence of controverted facts. [Matthews v. Railway, 26 Mo. App. l. c. 89; Dulaney v. Sugar Refining Co., 42 Mo. App. l. c. 662; Dodd v. Guiseffe, 100 Mo. App. 311.]

The evidence of plaintiff tends to accuse defendant of negligence in only one particular, viz., that the

Digitized by Google

engineer saw, or should have seen, the horse and buggy on the track in time to have avoided the collision, with the exercise of reasonable care. There is a serious question as to the sufficiency of the petition to tender the issue of such negligence but it is not necessary to discuss that question and we express no opinion upon it. A careful examination of the whole record discloses no error prejudicial to plaintiff at the trial and the judgment will be affirmed. It is so ordered. All concur.

JEWELL FEATHERSTONE by HUBERT A. CURTIN, her Next Friend, Appellant, v. KANSAS CITY TERMINAL RAILWAY COMPANY, Respondent

Kansas City Court of Appeals, December 12, 1913.

1. **NEGLIGENCE: Railroads: Trespassers.** The plaintiff, a minor, by her next friend, sued to recover damages for personal injuries sustained while picking up coal on the defendant's switch tracks. The switch track in question ran through some land owned by a lumber company, a part of which was used by children as playgrounds although they were trespassers. On the day of the accident the plaintiff was requested by a woman to go under a coal car and pick up a lump of coal. While she was under the car, the defendant's employees backed in some cars on the same track, without warning, although they were accustomed to warn anybody that might be in the way, and struck the car she was under, causing it to run over and crush her left leg. *Held*, that it makes no difference whether technically the plaintiff was a trespasser, a licensee, or an invitee, for she was at a place where the defendant's servants had every reason to expect her, or some other child to be. Such knowledge was enough, of itself, to impose a duty on them to give her warning and a negligent breach of such duty resulting in injury would be actionable negligence.

Digitized by Google

2. ———: ———: ———. Where a child is a trespasser on railroad property and is injured in a place where the company had no reason to anticipate her presence, there can be no liability to respond in damages imposed upon the company for the reason that no owner of property is bound to anticipate that his property rights will be invaded. But where a railroad company suffers its property to be used by the public either for the purpose of travel, or of recreation, and knows that it is being so used, it becomes charged with the performance of a duty towards such users to exercise reasonable care to avoid injuring them.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell,* Judge.

REVERSED AND REMANDED (*with directions*).

Kimbrell & White for appellant.

S. W. Moore, S. W. Sawyer and *Cyrus Crane* for respondent.

JOHNSON, J.—Plaintiff, a minor nine years of age, sues by her next friend to recover damages for personal injuries she alleges were caused by negligence of defendant. The answer is a general denial and a plea of contributory negligence. A trial in the circuit court resulted in a verdict for plaintiff in the sum of $7500, but on the hearing of a motion for a new trial the court set aside this verdict and granted a new trial on the ground of error "in refusing to give instructions offered by defendant and in refusing to sustain defendant's demurrer to the evidence offered at the close of all the evidence." Plaintiff appealed from this judgment and contends that the cause was properly submitted to the jury.

The injury occurred in the afternoon of November 25, 1910, on a tract of land owned by a lumber company in Kansas City on the south side of defendant's railroad tracks. The tract extended south from Twelfth street to Fifteenth street and was a block

Digitized by Google

wide, being bounded on the east by Elmwood avenue and on the west by Cypress avenue. A number of manufacturing and industrial concerns occupied a part of the tract as tenants of the lumber company and a spur railroad track owned by the lumber company connected these establishments with defendant's main line. This track ran from the main line in a southwesterly direction and then curved to the south and continued in a straight course through the middle of the tract to a point a few rods north of Fifteenth street where it ended. The track was used by defendant for switching and storing cars of freight received and forwarded by the tenants and other patrons of the lumber company. The south end of the property was vacant for a distance of 300 feet or more north of Fifteenth street and the track in this vacant block was used as an unloading track for cars of coal and other bulky freight. North of this place the track ran through an alley between the various manufacturing plants which, as stated, were tenants of the lumber company. Going out from defendant's main line the industrial track we have described ran down grade a short distance and thence on to the end on an increasing upgrade. At the south end the grade was so steep that cars set there for unloading were left with blocked wheels as well as with set brakes. Cars of coal and other freight were being almost constantly unloaded in the vacant block by patrons of the lumber company. These cars came in over the railroad of defendant and were switched to and from the end of the spur track by defendant's engines and train crews. Necessarily the cars had to be shoved in by the engines and whenever it became necessary to back into the end of the track with a string of cars, a brakeman was sent ahead to warn men at work in and about standing cars that the cars were about to be moved. Owing to the curve in the track and the narrowness of the alley this precaution was deemed essential to the protection of men en-

Digitized by Google

gaged in loading and unloading cars standing at various places along the track. West of Cypress avenue was a thickly settled residence district and the vacant lot had been used as a common playground by the numerous children of the neighborhood. They played there constantly on and about the track and frequently went in and under standing freight cars. They were not invited by the lumber company or defendant to make such use of the premises but were suffered to play about the track and, according to the evidence of plaintiff, were included in the warnings given by the brakeman sent ahead of approaching trains. Some of the housewives of the neighborhood and their children were in the habit of gleaning coal that fell from coal cars being unloaded and sometimes while following that humble pursuit, went between and under cars to pick up lumps that fell on the track. Plaintiff had lived in the vicinity a year and a half and, in common with other youthful denizens, had used the vacant lot as her playground and had become familiar with its customs and rules. She had played in and about standing cars and had often gone under cars to pick up coal at the request of some neighbor gleaner. Just before her injury she was playing "hide and go seek." There were four or five cars standing at the end of the track, among them two coal cars that were being unloaded. A woman not related to her was picking up coal that fell from one of the cars and asked her to go under the car for a lump that had fallen on the track. She ceased playing to comply with the request and crawled under the car. Before she could return a train backed in by defendant violently collided with the stationary cars and wheels of the car under which she had crawled ran over and crushed her left leg. No warning of any kind was given of the approach of the train to the men at work in the cars or to the children playing around them.

Digitized by Google

Defendant admits that it had always sent a brakeman ahead of each train to give warning but its witnesses say that no advance courier was sent in the present instance, for the reason that the disturbance of the cars at the end of the track was not intended but was due to an unavoidable accident; that it was not the purpose of the crew to shove this string of cars being handled by the engine into the vacant lot; that owing to the great weight of the load the engineer had been compelled to back in at high speed and that when he attempted to slow down to stop at the required place the train parted and the detached cars ran ahead into the standing cars. There are facts and circumstances in evidence brought out by counsel for plaintiff which tend to contradict this version of the injury and to show that the train was backed into the standing cars intentionally for the purpose of taking away an unloaded car.

The only real questions in the case for our determination are those presented by defendant's demurrer to the evidence and in the consideration of those questions we shall assume that the train was backed into the standing cars intentionally and without the observance by the train crew of defendant's usual custom of giving warning of such movement.

There is a controversy in the evidence over the issue of whether these warnings were given also to children at play about the track. The trainmen say, in effect, that the custom was self-imposed, and not for the benefit of anyone except those working in and about the cars, but admit that when the advance brakeman observed children on and about the track, he ordered them away and generally "was rocked" by the children for his pains. The evidence as a whole presents the inference that the custom of giving warning was intended to be used and was used for the benefit of all persons found in the way of the advancing train and the controlling question in the case is whether or

Digitized by Google

not plaintiff in law was entitled to rely on the observance of the custom as a duty defendant had assumed towards her. The cause of action pleaded in the petition is grounded in negligence and negligence means a breach of duty. Consequently if it could not be said that defendant owed plaintiff a duty to be on the lookout for her and to give her warning, then it could not be said that her injury was caused by negligence of defendant. In approaching the question of plaintiff's status at the time of her injury, we dismiss as relatively unimportant the incident of her going under the car at the request of the woman who was picking up coal. Plaintiff's relation to defendant was not that of an uninvited but tolerated gleaner of coal, but was that of a young child at play on defendant's premises with the knowledge and implied consent of defendant. In their play the children went between and under the standing cars and any child of an obliging disposition would have turned aside from play a moment to comply with the request of an adult for a small service that would be as much play as work. The child was at play when injured and we pass to the question of whether she was in a place where the servants of defendant were required to anticipate she might be. The cases in this State which deal with various phases of the subject of children playing about railroad tracks are numerous and it would serve no useful purpose to review them. The general rule is that where a child is a trespasser on railroad property and is injured in a place where the company has no reason to anticipate its presence, there can be no liability to respond in damages imposed upon the company for the reason that no owner of property is bound to anticipate that his property rights will be invaded. But where a railroad company suffers its property to be used by the public either for the purpose of travel or of recreation and knows that it is being so used it becomes charged with the performance of a duty towards such users to exer-

Digitized by Google

cise reasonable care to avoid injuring them. As is said in Conley v. Railroad, 89 Ky. 402:

"Where one is injured as the result of a plain and manifest duty for the protection of human life or safety, the party thus causing the injury will not be heard to say in justification, that he was dealing with his own property and that the person injured was technically a trespasser."

It makes no difference whether, technically, plaintiff was a trespasser, a licensee or an invitee, her evidence shows she was at a place where defendant's servants had every reason to expect her, or some other child, to be. Such knowledge was enough, of itself, to impose a duty on them to give her warning and a negligent breach of such duty resulting in injury would be actionable negligence. To hold that defendant's servants, knowing that little children, in all reasonable probability, would be in and about the stationary cars, still owed them no duty of reasonable care, would be to declare a rule of conduct abhorrent to the most common instinct of humanity. The court did right in overruling the demurrer to the evidence and erred in granting a new trial.

The judgment is reversed and the cause remanded with directions to enter judgment for plaintiff in accordance with the verdict.

All concur.

ON MOTION FOR REHEARING.

We are asked by defendant to grant a rehearing and if this is not done to certify the cause to the Supreme Court on the ground that the foregoing opinion is in conflict with the following cases decided by the Supreme Court: Rushenberg v. Railroad, 109 Mo. 112; Burney v. Railroad, 126 Mo. 372; Ostertag v. Railroad, 64 Mo. 421; Kelly v. Benas, 217 Mo. 1.

Digitized by Google

These decisions were considered in the preparation of our opinion, and we thought, and still think, their doctrine is not inconsistent with the view that the peculiar and differentiating facts and circumstances of the instant case presented issues for the triers of fact to determine. The rule that circumstances alter cases obtains in jurisprudence as well as in ethics and its proper application in comparing the cases cited by defendant with the case in hand discloses striking and, we think, vital dissimilarities.

The motions for rehearing and to certify are overruled. All concur.

CLAUDIE KEYS et al., Respondents, v. THE NATIONAL COUNCIL KNIGHTS AND LADIES OF SECURITY, Appellant.

Kansas City Court of Appeals, December 1, 1913.

1. **FRATERNAL BENEFICIARY ASSOCIATIONS: Premiums: Suspension for Nonpayment.** Where the by-laws, rules and regulations of a fraternal insurance order provides that failure to pay the specified monthly premiums on or before the last day of the current month shall cause the member to be suspended without further action of any kind, any member failing to pay such monthly premiums is, *ipso facto*, suspended at midnight on the last day of said month and, if death occurs during such suspension, such member's policy cannot participate in any of the funds or benefits of the order, unless the suspension and forfeiture caused thereby has been waived by the company.

2. ———: ———: ———: ———: **Waiver.** In the case at bar, waiver may be of two kinds, first, waiver of forfeiture by accepting and retaining premiums with knowledge of the facts constituting the forfeiture, or by retaining the premiums after receiving knowledge of the facts, and, second, waiver of the defense of forfeiture by failing to assert a forfeiture after a loss has occurred, and, with knowledge of such forfeiture, inducing the beneficiaries under the policy to go to trouble and expense in complying with the terms of the policy as if it were in force.

Digitized by Google

3. ———: ———: ———: ———: ———. Waiver, by acceptance of premiums, is not based on contract, but on estoppel of the company to insist upon conditions of the policy inconsistent with the acceptance or retention of the premiums. While waiver is a matter of intention, this means the intention the law will infer from a given course of conduct and not the mere purpose the insurer may have had in mind. Waiver arises from the doing of inconsistent acts. The intention to waive is gathered from what is done. And if a forfeiture has been once waived it cannot be subsequently revived and relied upon to defeat a recovery after a loss has happened.

4. ———: ———: ———: ———: ———. Where the rules prescribe that a member, suspended for failure to pay dues, may be reinstated without a health certificate upon payment of said dues at any time within sixty days from suspension, provided such member is in good health, the forfeiture caused by such delinquency and ill health is waived by the acceptance of premiums with knowledge of such ill health. And, if in addition to the above, the rules prescribe that a member, paying up delinquent dues, after the lapse of sixty days from suspension, shall furnish a medical certificate of good health, then the known acceptance of dues so paid, without requiring the health certificate, is a waiver of the ill health and of the forfeiture caused thereby.

5. ———: ———: ———: ———: ———. A waiver of a defense cannot be inferred from mere silence of the company. It is not obliged to do or say anything to make the forfeiture effectual. But if, after knowledge of the forfeiture, negotiations or transactions are had with the insured in which the company impliedly recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is waived as matter of law, and such waiver need not be based upon any new agreement or an estoppel.

6. ———: ———: ———: ———: ———: Evidence: Jury Question. Where the issue is whether or not the company has followed a course of conduct which may be said to indicate waiver, the question of waiver is one for the jury. And where there is evidence from which waiver may be inferred the question must be left to the jury.

7. INSTRUCTIONS: Omission In. An instruction defining waiver, which was the real point at issue in the case, cannot be upheld where, on account of the omission therefrom of certain words, it is meaningless. In such case the argument made to the jury cannot be looked to in order to learn whether the jury were informed of what was its meaning. Instructions are

Digitized by Google

difficult enough to understand without requiring the jury to guess at the meaning or at what was intended to be said in the instruction.

Appeal from Buchanan Circuit Court.—*Hon. W. K. Amick,* Judge.

REVERSED AND REMANDED.

William E. Stringfellow for appellant.

F. W. Paschal for respondents.

TRIMBLE, J.—This is a suit on a fraternal beneficiary certificate of insurance issued by the defendant to one of its members, M. M. Keys, whereby it agreed to pay $2000 to the beneficiaries therein named, upon the death of said M. M. Keys while a member of said order in good standing.

The plaintiffs are the said member's three minor children who were named as beneficiaries in said certificate, and they prosecute this suit through their statutory guardian.

Mrs. Keys died December 28, 1910. It is defendant's contention that, at the time of her death, she had forfeited her rights and was not a member in good standing, but stood suspended by reason of her failure to pay certain monthly premiums, dues or assessments, within the time required. Plaintiff met this contention with the charge that this requirement of prompt payment of said monthly dues, on pain of suspension if they were not so paid, had been waived, and that defendant was estopped to defend the plaintiff's claim. A trial of this issue was had, and the jury found a verdict in favor of plaintiff for the amount due on the certificate. Defendant appeals, and contends that there was no evidence of any waiver.

Mrs. Keys had been a member and the holder of the certificate in the order since October 4, 1901. On

Digitized by Google

May 26, 1904, the plaintiffs were duly named therein as beneficiaries in place of the former beneficiary. By the rules of the order and the terms of the contract, the member was required to pay a certain premium each month, and if same was not paid on or before the last day thereof, the member, *ipso facto,* stood suspended at midnight of said last day. During such suspension the member had no rights under his or her beneficiary certificate, and, if death occurred while such member was thus in suspension, nothing could be collected on said certificate. But if, at any time within sixty days after suspension, a member paid up the assessments which were delinquent, he was reinstated to his full rights, provided, that at the time of making such payment, he was in good health. When such delinquent dues were thus paid, however, the defendant accepted them without investigating to learn whether such member was in good health or not, and no form or ceremony was required to perfect a reinstatement; the money was received and the member marked "reinstated" on the books. If the payment of the delinquent dues occurred after the lapse of sixty days from delinquency and consequent suspension, then, according to the written rules and terms of the contract, a medical examination certificate showing good health, was required before the member could be reinstated.

The defendant order was composed of various "councils," each located in its respective community and made up of the individual members at that place, and the executive head of the institution, or "national council" as it was called, was located at Topeka, Kansas. Mrs. Keys was a member of the local council at St. Joseph. In each local council there was an officer called the "financier." The individual members of the order paid their assessments or monthly dues to this local officer, and it was his duty to send the money thus collected by him to the national council each

Digitized by Google

month, together with a detailed statement showing the names of the members who paid, the amount of each payment, the rate, and other items of information. If a member's name did not appear on this report as having paid his assessment, the absence of his name showed that he was delinquent, and his delinquency was apparent in each succeeding monthly report until his name appeared with a credit of the amount paid by him in settlement of the assessments due. It was the custom and general practice of these various local officers or "financiers" to send in their reports of collections for each month about the 20th of the succeeding month, and to include in such report *all collections and payments made up to the time of sending in the report.* This was well known and understood by the head council, and was in fact recognized by its rules.

Deceased failed to pay her assessment for May, 1910, and at midnight of the 31st of that month, she, *ipso facto,* stood suspended. The report of the local "financier" to the national council made June 20, revealed this fact because no payment by her was reported therein. She also failed to pay her assessment for June, 1910, and again the local "financier's" report made about the 20th of July showed her delinquency. It was therefore apparent to the company itself, as well as to the agent that she was delinquent for both May and June. She did not pay any assessments or premiums during July, but on August 20, 1910, being then delinquent for July also, she paid the three assessments for May, June, and July, and these were sent in by the local "financier" in his report for July, and Mrs. Key's name was thereupon marked "reinstated." The premiums for August and September, 1910, were thereafter paid within the time required for them. At the time the delinquent payments for May, June, and July, were made, that is, on August 20, 1910, Mrs. Keys was not in good health but no inquiry in regard thereto was made either by the local "financier" or

Digitized by Google

by the head or "national council," following their usual custom of accepting delinquent premiums and reinstating the member without asking as to health. These payments were made to the local "financier" by Mrs. Keys' son who was directed by her to do it, she not being able to go to the financier's office.

On August 8, 1910, Mrs. Keys went to a hospital in Kansas City suffering with cancer of the uterus, an incurable disease from which she died in the hospital on December 28, 1910, having remained at the hospital constantly from the time she entered it.

On December 27th, the day before she died, Mrs. Keys told her son to pay the premiums for October, November and December, amounting to $6.50 and he sent a draft for that amount to Mr. Webb, the local "financier" at St. Joseph, with a letter telling him it was in payment of his mother's premiums. Webb observing that the money was not sent in Mrs. Keys name, did not credit it on the books but wrote to the son that he held it only on condition his mother was in good health. Not receiving any reply to this, and learning, on December 30, of Mrs. Keys death, Webb, after consulting the president of the company at Topeka, Kansas, sent the money to J. B. Hinkle at Kansas City, with minute directions to return it to Mrs. Keys' son, and, if he refused to take it, to make him a formal tender of it. Hinkle could not find young Keys and finally returned the money to Webb. Young Keys was a minor and one of the beneficiaries named in the certificate of insurance sued on. Hinkle could not find him in Kansas City because he had returned to St. Joseph.

Shortly thereafter an attorney went with a Mr. Brown, who seems to have been a relative or friend of the Keys children, to Webb's office and asked him if they were going to contest the payment of the Keys' claim. Webb told him he did not know, but that his instructions were to have a guardian appointed for the

Digitized by Google

children so that the matter could be taken up. The attorney then told him that the children had no other property requiring the appointment of a guardian, and that if the company intended to refuse payment of the insurance claim, the appointment of a guardian was unnecessary, as suit could be brought by next friend. To which Webb replied that he did not know what the company would do but that it was necessary to have a guardian appointed, and such were his instructions.

Thereupon Bowen was appointed guardian for the three children by the probate court, and duly qualified. When he did so, Webb immediately tendered to him the $6.50 sent Webb to pay Mrs. Keys' last premiums.

As stated above, the answer set up that Mrs. Keys, by failing to pay the assessment for October, on or before the last day of that month, became suspended and her certificate void and all her rights thereunder forfeited inasmuch as she was not in good health when she paid the October assessment on December 27th. (It will be noticed that this assessment was paid within sixty days after the delinquency which occurred at midnight October 31st.) Plaintiffs' reply set up that defendant was estopped from setting up the failure to pay said assessment in the time specified by the by-laws, because the course of dealing with Mrs. Keys was such as to waive a strict compliance therewith in that regard; that Bowen, the guardian of the children, was not the legal representative of the estate of Mrs. Keys and that the tender to him of the $6.50 paid was not a tender to the proper person; that defendant knew, at the time of Mrs. Keys death, that she had not paid her premiums in time but, notwithstanding such knowledge, defendant had requested plaintiff to go to the expense of furnishing proofs of death and of having a guardian and curator appointed, by reason of which fact defendant was estopped from making any defense to plaintiff's claim.

Digitized by Google

It is the contention of defendant that it did not know Mrs. Keys was delinquent for the months of May, June and July when her premiums for those months were paid on August 20th, in the local "financier's office in St. Joseph; and that it had no knowledge nor means of knowledge of her ill health at that time and did not learn of such ill health until in the course of the trial. Consequently, after the evidence was in and the parties had rested, defendant asked leave to amend its answer so as to include said assessments for the seven months from March to September, 1910, both inclusive, and to state an offer to return, to a tender of, said assessments aggregating $11.20, such amendment being sought to be made in order to conform to the proof. It appeared that on July 5, 1912, about three months before the trial, the defendant took the deposition of Dr. McCall of the hospital where Mrs. Keys died, and his testimony therein showed that Mrs. Keys was not in good health on August 20, 1910, and yet the company retained the premiums paid on that date and also those down to and including September paid thereafter, and did not offer to return them till after the case had closed. The court refused to permit the amendmment.

Where the issue is whether or not the company has followed a course of conduct which may be said to indicate waiver, the question of waiver is one for the jury. [Fink v. Ins. Co., 60 Mo. App. 673; Summers v. Ins. Co., 45 Mo. App. 46.]

It is thus seen that the problem to be first solved in this case is whether there is any substantial evidence from which a waiver can be inferred. If there is, then the verdict of the jury is, in the absence of error in the trial, determinative of that fact.

In order to correctly determine whether or not there is any evidence that a waiver was created by the course of dealing adopted by the company, it is necessary to keep clearly in mind just what constitutes a

Digitized by Google

waiver, what are its constituent elements, and how it may be shown. "Waiver by the acceptance of a premium is not based upon contract, but on estoppel of the company to insist on conditions of the policy inconsistent with the acceptance or retention of the premium." [Monahan v. Ins. Co., 63 Atl. 211, l. c. 214.] While it is sometimes said that waiver is a matter of intention, this does not mean that the one alleged to have waived must have expressly or purposely intended to waive. The waiver arises from the knowingly doing of inconsistent acts. The intention to waive is gathered from what is done, and if a person, with knowledge of the facts, does something inconsistent with a right or of his intention to rely on it, his act will constitute a waiver even though he may not have had in mind any purpose or intention to waive. [Tobin v. Western Mut. Aid Society, 72 Iowa, 261, l. c. 264.] The test of a waiver is whether the acts and conduct of the insurer are inconsistent with the intention to insist on strict compliance with the terms of the policy. [Lake v. Ins. Co., 81 N. W. 710, l. c. 712.] If a forfeiture has been once waived, it cannot be subsequently revived and relied upon to defeat a recovery after a loss has happened, for a forfeiture that is waived is treated as having been eliminated from the contract. [Baltimore Ins. Co. v. Howard, 52 Atl. 397, l. c. 399; Burgess v. Mercantile Ins. Co., 114 Mo. App. 169, l. c. 184.] As between insurance companies and their beneficiaries, a rigid application of the general rule that there shall be actual knowledge of the forfeiture or of the cause producing the forfeiture before a waiver can be shown, will not be insisted upon in all cases. [Monahan v. Ins. Co., supra; Baltimore Life Ins. Co. v. Howard, supra.] "If the company ought to have known of the facts or with proper attention to its own business would have been apprised of them, it has no right to set up its ignorance as an excuse." [Knights of Pythias v. Kalinski, 163 U. S. 289,

Digitized by Google

l. c. 298.] Slight evidence, indicating an intention to waive, will be sufficient to prevent a forfeiture from taking effect and thereby defeating valuable rights. [Francis v. A. O. U. W., 150 Mo. App. 347, l. c. 356.] A waiver of forfeiture may be inferred when the insurer, after knowledge of the act of forfeiture, requires the assured, by virtue of the requirements in the policy, to do some act or incur some expense. [McCollum v. Niagara Ins. Co., 61 Mo. App. 352; Supreme Tent Knights of Maccabees of the World, 57 N. E. 203, l. c. 207.]

Applying these principles to the facts in the case before us, we find: 1. That the company was in the habit of accepting premiums from suspended members, at least if paid within sixty days from suspension, without inquiry as to whether they were in good health or not. 2. That the company knew, whenever a report for a month came in, that a member, whose name was not shown as having paid a premium, was delinquent and suspended. 3. That it knew that reports of collections were not sent in until the 20th of each month, and that all collections made up to the day of sending the report in were included in the report. 4. That the local "financier's" office knew, on August 20, 1910, that Mrs. Keys was delinquent and stood suspended from May 31st, more than sixty days previous, and yet took the premiums paid at that time without inquiring as to her health and *without demanding the certificate of medical examination showing good health.* She was marked "reinstated" although the by-laws provided that she could not be reinstated without the aforesaid certificate. It seems to the writer that the acceptance of the premiums paid on August 20th, when a certificate of good health was necessary, and Mrs. Keys' reinstatement without such certificate, was a reinstatement of her *without regard to the question of her health.* But it is said the company itself did not know Mrs. Keys was more than

Digitized by Google

sixty days in arrears when she was reinstated. But the local financier's office knew it, and this knowledge was knowledge of the comapny. It knew that reports for preceding months were not sent in until the 20th of each succeeding month, and that this report was not sent in until after the 20th of August; and it knew also that the local "financier" sent in all moneys collected up to the date of sending in their reports. The blanks used in sending in such reports had no provision therein for showing the date when moneys were actually paid to the "financier." Hence, if the company did not know from the report that the premiums were paid after the lapse of sixty days from the date they were due, its ignorance was not the result of any deception practiced by Mrs. Keys, but was the result of the act of the company's agent in reporting it and of the method of sending in all collections received up to the date of the report. Nor was it the result of any conspiracy on the part of Mrs. Keys and the agent to defraud the company. If the company, by its method of obtaining reports and allowing them to be made without showing when the money was actually paid to its agent, could not tell whether payments were made on time, or, if not on time, whether they were within the sixty days, it would appear to the writer that the company ought not to be permitted to set up its own ignorance, resulting from its own negligent system and method of transacting business, as a valid reason for the nonapplication of the doctrine of waiver. [Monahan v. Mut. Life Ins. Co., 63 Atl. 211, l. c. 213.] In the absence of fraud on the part of Mrs. Keys it is difficult to see why a different rule should be applied to a company of this character from that applied to any other. But, even if it be true that a mutual, fraternal, company of this kind should be permitted to indulge in the presumption that, when the agent sent Mrs. Keys' name in as having been reinstated, he did so because she paid her premiums inside and not out-

Digitized by Google

side of the sixty days, and to indulge in the further presumption that, if she did pay it within the sixty days, she was in good health, and therefore the company's reception and retention of such premiums would not constitute a waiver, in the absence of knowledge that it was so paid out of time, still evidence of all such facts is admissible where there is other evidence tending to show that the company did have knowledge of the situation and manifested an intention to receive said premiums and retain them regardless of her health or ill health. That is to say, if, in addition to all the facts above set out showing the habit of the agent to send in all collections actually required up to to the 20th and defendant's method of keeping the accounts, there is evidence of defendant's conduct *from which it may be inferred that defendant did know of such ill health,* or that it knew that the premiums were not paid within the sixty days, or that, after learning that the agent had received premiums from the member without regard to the latter's health or ill health, the company ratified such act by retaining premiums thus paid, then the question of waiver was still one for the jury. In our opinion there was such other evidence as we shall presently show.

After Mrs. Keys' death, when the company was undoubtedly well aware of the facts concerning Mrs. Keys' being in arrears for the dues of October and November and of her ill health at the time they were paid, the company, when asked if it intended to insist on the forfeiture, failed to assert such defense, but requested plaintiff to go to the expense of having a guardian appointed for the beneficiaries and insisted upon it, although told by plaintiffs that they had no other property and that the appointment of a guardian was unnecessary unless the claim was going to be paid. There was no absolute denial of liability. The company knew then perfectly well the facts constituting forfeiture by reason of the failure to pay the October

Digitized by Google

and November dues. Webb had consulted the president and had been told what to do. And when the question was asked whether the company was going to contest or not, Webb instead of frankly telling plaintiffs that it was going to insist on a forfeiture, told them he didn't know but that *his instructions were to have a guardian appointed.* The only function or duty a guardian could possibly have in the premises would be to *receive the money* when it was paid. No guardian was necessary in order to furnish proofs of death or of facts bearing on the question of forfeiture. The blanks furnished by the company did not require any affidavit from the guardian. Those were to be furnished by other persons. The only possible reason the company could have for insisting upon a guardian was to have in existence *some one to whom it could legally and safely pay the money.* The fact that the company did not at once openly and unequivocally announce that there was a forfeiture which would be insisted upon, but shuffled, and evaded the question and wanted proofs of death and a guardian appointed, was some evidence tending to show that the company knew that Mrs. Keys had made former payments while in ill health and that a waiver could be established if plaintiffs had sufficient evidence of the company's knowledge; and that the company intended to hold on to such former payments so long as it appeared certain that its right to declare a forfeiture for nonpayment of the October dues was not thereby jeopardized. In other words, even though the reception and retention of such former premiums may not constitute a waiver, as matter of law, yet such reception and retention and the attendant circumstances can be taken into consideration by the jury, along with all other evidence throwing light upon the conduct of the company, in determining the question whether or not a waiver was created during Mrs. Keys' lifetime. This is strengthened by the fact that on July

Digitized by Google

5, 1912, defendant took the deposition of Dr. McCall and from his testimony received actual knowledge that Mrs. Keys was in bad health on the 20th of August, 1910, and yet retained the May, June, July, August, and September premiums for nearly three months thereafter, and never did offer to return said premiums until after the evidence at the trial was all in and the case had been closed. True, this knowledge came after suit was brought, but the retention of the money thereafter could be considered as a circumstance bearing upon the question of the previous intention of the company, and its consequent knowledge at the time it received said former premiums on August 20th, and of its conduct in thereafter accepting the premiums for August and September which Mrs. Keys paid after the company had received the former dues without asking as to her health or requiring a certificate. In other words, the retention of premiums, after Mrs. Keys' death and after actual knowledge of all the facts as to her ill health, could be considered by the jury along with all the evidence of the company's prior course of dealing with Mrs. Keys and its subsequent course of dealing with the plaintiffs, in determining whether or not there had or had not been a waiver during her lifetime. Or, to state it in still smaller compass, the subsequent retention of premiums, after actual knowledge, would tend to throw some light on the true nature of the company's intention prior to Mrs. Keys' death and of its probable knowledge of her ill health before that event, and for that reason could be considered for that purpose. At any rate the retention of premiums, after learning that Mrs. Keys was in bad health when they were paid, could be considered as a ratification of the agent's act in accepting them in the first place. The agent did not have to actually know she was sick. He knew that she was more than sixty days overdue and that, if ill health was going to cut any figure, a certificate of good health was required.

Digitized by Google

Consequently, when the agent took the premiums without the certificate, this was a waiver, on his part at least, of any question as to health, and when the company, after learning that she was in bad health, continued to retain the premiums she had paid, was not this a ratification of the agent's act? And do not all these facts tend to create a situation from which a jury could infer that the company, at the time it took the premiums was doing so without regard to the health or ill health of the member? And if its purpose was to get the premiums regardless of conditions, then the forfeiture was waived. So that, taking all these things into consideration, it cannot be said that, as matter of law, there was no evidence of waiver in the case.

The conduct of the company in not promptly, openly and emphatically declaring a forfeiture is not only admissible and can be considered in determining what was in its knowledge while retaining Mrs. Keys' premiums prior to her death, but, such conduct can also be considered as creating a waiver of its defense of forfeiture after her death, if the company required the appointment of a guardian and plaintiffs were thereby induced to go to the extra trouble and expense of having one appointed. In this case the company did not merely sit close-mouthed letting plaintiffs choose their own course, and then, when the proper time came, raise the defense of forfeiture. It did more than this. While it endeavored, it is true, to place itself where it could insist on a forfeiture if it chose to do so, still it did not unequivocally declare that it would insist on a forfeiture. Even when asked what it was going to do, an evasive answer was given, and the appointment of a guardian was required. And this, too, in the face of the fact that the company knew the children had no property and would need no guardian if the claim were not paid; that the proofs of death, and of the facts bearing upon the forfeiture now relied upon, could be presented without the ap-

Digitized by Google

pointment of a guardian; and that all a guardian could possibly do in the premises, which could not be done without him, would be to receive payment of the policy. It is true the rules of the company required that, where the beneficiaries were minors, proof of the appointment of a guardian must be made. This, however, was not to establish the death of the insured or any facts showing forfeiture or nonforfeiture, but was necessary only in case the company was going to pay. The appointment of a guardian was not necessary, therefore, to enable the company to inform itself as to any of the facts or to put it in a position where it could assert a forfeiture of the policy. It was incumbent upon the company, therefore, to assert its right of forfeiture then and there, and let plaintiffs take any course they may have seen fit to pursue. The authorities are very strict in holding a defense waived where the company, with knowledge of the facts, causes the plaintiff to go to extra trouble and expense in furnishing proof since such is, by implication, a recognition of the continued validity of the policy. In Titus v. Ins. Co., 81 N. Y. 409, the company, with knowledge of the facts constituting a forfeiture, required the insured to appear before an examiner and submit to an examination. It was held that this constituted a waiver. At page 419, the court says: "When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a

Digitized by Google

suit commenced therefor, allege the forfeiture. But it may be asserted broadly that if in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel." It was contended in that case that the act relied upon to constitute waiver must be attended with such equitable circumstances as would constitute estoppel, and that as the plaintiff was not induced to in any manner change his position, as the acts were done after the forfeiture occurred, they did not create an estoppel. The court, however, said this position was untenable; that it is not true that such waiver can be created only by such acts or conduct as would create a technical estoppel. In Cannon v. Home Ins. Co., 53 Wis. 585, there was a breach of conditions out of which a forfeiture arose. The company was asked if it was going to insist on the forfeiture. Without saying whether it was or not, it requested proofs of loss which the insured furnished at a cost of about twenty-five dollars. The court held that the forfeiture was waived. It was argued in that case that, as the company did not say it would pay, there was no misleading of plaintiff to his injury. But the court asks why did not the company say that it would insist upon the forfeiture? It further held that the requiring of proofs of loss was a treating of the policy as still in force, and the question therefore arose, was the plaintiff, in relying upon such conduct, misled to his injury or prejudice?

In Traders, etc., Ins. Co. v. Johnson, 200 Ill. 359, it is held that if a company has knowledge of its right to declare a forfeiture, but did not then insist upon it but recognized the continued validity of the policy

Digitized by Google

by requiring the beneficiary to go to the expense and trouble, if any, of preparing proofs of death and other facts connected with the loss, an intention to waive the forfeiture follows as a legal result.

In Granger v. Manchester Ins. Co., 119 Mich. 177, it was held that where the company, with knowledge of the forfeiture, called for additional proofs, the forfeiture was waived although in the letter calling for the proofs there was a general statement that the company did not thereby waive any defense it might have. This was certainly as strong as the stipulation in the rules of the company, in the case at bar, that the requirement of proofs would not waive any defense.

In Bowen v. Ins. Co., 69 Mo. App. 272, the forfeiture relied on was the violation of the "iron safe" clause. The company did not discover the violation of this clause until the adjusters were on the ground. The evidence tended to show that, with this knowledge, the adjusters requested Bowen to assist in going over the books with them. He did so for six or eight hours, and then they notified him that the company denied all liability by reason of the violation aforesaid. It was held that the court properly submitted the question of waiver to the jury.

In Dolan v. Missouri Town Mut. Ins. Co., 88 Mo. App. 666, l. c. 674, it is said: "If a defendant, through its agents, after becoming aware of its defenses, has led plaintiff into additional expense and trouble in preparing proofs of loss, it would be considered as having waived such defenses of which it was aware at the time.

In New York Ins. Co. v. Baker, 83 Fed. 647, l. c. 652, it is said that after the company "became aware that the policy was invalid, it was not entitled to exact from the plaintiff a technical compliance with the provisions of the policy relative to proofs of loss, which would involve her in trouble and expense, unless, on

Digitized by Google

its part, it had resolved to pay the loss when such proofs were supplied."

But it is contended by defendant that this rule has no application here because plaintiffs knew from the refusal to accept the premiums, and the endeavor to return them, that the company was going to insist on the forfeiture, and consequently they were not misled to their injury or prejudice. But no one told plaintiffs positively that the company was going to deny liability. The plaintiffs knew, and all they knew was, that the local agent had taken certain steps to preserve the company's right to a forfeiture *if it chose to insist upon it.* And while the mere furnishing of blanks at plaintiffs' request, with the notice contained in said blanks that furnishing them did not waive any of the company's rights, may not, *of itself,* constitute a waiver (which we do not decide), yet in this case there was much more than this. The company was told that the children had no other property and that the proofs of death could be made and the question of the company's liability could be litigated without the appointment of a guardian if the company was going to refuse payment. To this the agent replied he did not know what the company would do but that its instructions were to have a guardian appointed. It would seem that under these circumstances the question whether the plaintiffs were thereby induced to go to the trouble and expense of having a guardian appointed, in such manner as to constitute a waiver, should have been submitted to the jury.

To sum it all up, on the question of whether a demurrer to the evidence should have been sustained, we think that the company, through its agent Webb, knew that Mrs. Keys was more than sixty days in arrears when she paid her May, June, and July dues on August 20th, and, by the receipt and retention of such dues *without requiring a certificate of health,* the

Digitized by Google

company waived the forfeiture arising out of those facts, or, at least, to state it more accurately, evidence of the stated and attendant facts was sufficient to send the question of waiver to the jury, and evidence of the subsequent retention of the premiums, after actual notice, through Dr. McCall's testimony, of her ill health, was admissible as throwing light upon the intention disclosed by the prior receipt and retention of such sums. It was also admissible as showing a waiver by way of ratifying the agent's act in accepting the premiums of August 20th, regardless of the question of health.

We think also that there was sufficient evidence requiring the submission to the jury of the question, whether or not the company, by failing to state positively and definitely that the forfeiture would be insisted upon, and by requesting the appointment of a guardian, induced plaintiffs to go to the extra trouble and expense of obtaining a guardian, thereby resulting in the waiver, by the company, of the defense of forfeiture. So much for the question of the propriety of the court's ruling upon the defendant's demurrer to the evidence. It was properly overruled.

We are next to inquire whether the question of waiver was properly submitted to the jury. The question whether the company on August 20, waived the forfeiture on account of Mrs. Keys being delinquent and in ill health, would depend upon whether the company took her payment of that date with knowledge of her ill health, or with knowledge that she was more than sixty days overdue and without requiring a health certificate, which was the same as taking it without regard to her health or ill health, or would depend upon whether the company, after receiving actual knowledge of her ill health through Dr. McCall's testimony, ratified the agent's act in receiving her premiums on August 20th, without a certificate, by retaining said premiums and failing to return them. Whether there was

Digitized by Google

such prior knowledge or subsequent ratification was for the jury to say. If the company took and kept the premiums of August 20th, with knowledge, then it waived the forfeiture at that time; or if, without knowledge that the agent had accepted her premiums out of time, or while she was in bad health, the company nevertheless retained such premiums after learning that she was in bad health at the time the agent received them, such retention by the company would amount to a ratification of such agent's act and relate back to and effect a forfeiture as of the time when the agent accepted said premiums. In this view of the matter such subsequent retention would not be a revival of a cause of action already dead but would be merely the election to keep alive that which would live or die according to the choice of the company. If plaintiffs' instruction No. 2 means to rely upon the retention of the premiums paid August 20th, after having actual knowledge of the facts, to constitute a waiver by way of ratification of the agent's act, then it would be correct provided it clearly and unmistakably expressed that idea, and left it to the jury to say whether or not all those things occurred. The instruction is somewhat involved and therefore not as clear as it might be. In addition to this, a few words were evidently omitted, so that its meaning is still more obscure. As it was the only instruction defining waiver caused by the reception and retention of premiums; and as the court modified defendant's instruction, and, in such modification, referred to plaintiffs' instruction No. 2 for a definition of waiver, the omission in said last named instruction became doubly important. As the instruction reads, with the omission unsupplied, it is meaningless. We cannot say that the jury understood its meaning from the argument made in the case. It is much better to require instructions to say what they mean than to allow important omissions to be made therein and then attempt to ascertain whether

Digitized by Google

or not the jury understood what was left out. It is difficult enough to understand the average instruction without making it a still greater puzzle by requiring the jury or the court to guess at what was intended to be said.

With reference to the evidence showing that Mrs. Keys' neighbors knew she was sick, we think it was error to admit such testimony. The purpose was to show that the company had actual knowledge of her sickness. It was not shown that knowledge of the neighbors was of such a character as to show or even raise an inference that it was communicated to the company or reached the ears of the agent. Hence it had no efficacy in showing knowledge of either the company or the agent. For the reasons given the judgment is reversed and the cause remanded for a new trial. All concur.

RUBEY TRUST COMPANY, Respondent, v. ED. R. WEIDNER, Appellant.

Kansas City Court of Appeals, December 1, 1913.

1. **STATUTE OF FRAUDS: Original Undertaking not Within.** Where a bank, upon the presentation of the checks of an athletic club refused to pay same because the club had no funds, was told by defendant that if it would pay out the money called for by the checks and others that had been given but not yet presented, he would himself pay them, and the bank, in sole reliance upon such promise, paid out the money sued for on such checks, defendant will be liable to the bank, as upon an original undertaking even though defendant's promise was oral, since the Statute of Frauds does not apply in such case.

2. **———: ———: What is Such an Undertaking.** The agreement must be an express agreement on the part of defendant himself to pay, and not a promise to pay the club's debt if it did not, and the money must have been paid out solely on the credit of such agreement and not on the strength of credit extended either in whole or in part to the club.

Digitized by Google

3. ———: ———: ———: **Jury Question.** If the agreement claimed by plaintiff was an original undertaking, and not a promise to pay the debt of another, and credit was not in fact extended to the club, then the mere fact that, for convenience of bookkeeping, the checks paid were kept on the books as an account of the club will not defeat plaintiff's claim. Such fact is a circumstance bearing on the question whether credit was given to the club or not, but it is not conclusive of that fact. And it is for the jury to say whether defendant assumed the attitude of principal or stood merely as a security for the club. Where there is any evidence to show an original undertaking on the part of defendant to pay, the jury's verdict finding that it was such an undertaking cannot be overturned.

4. ———: ———: ———: **Accepting Deed of Trust from Club Afterward.** Such original undertaking is not destroyed nor is credit extended to the club by the acceptance afterward of a deed of trust from the club, where it clearly appears that the bank did not seek, but was offered, the deed of trust by the club, and it was known that it was very doubtful whether the deed of trust was of any value and was accepted by the bank merely on the condition that, if anything was realized over and above other liens, it would be accepted by the bank to reduce the debt.

Appeal from Macon Circuit Court.—*Hon. B. R. Dysart,* Special Judge.

AFFIRMED.

D. L. Dempsey and *George N. Davis* for appellant.

Guthrie & Franklin for respondent.

TRIMBLE, J.—The respondent, a banking institution in the city of Macon, Missouri, sued the appellant to recover a sum of money paid out by the bank at the instance and request of appellant. The money so paid out, and for which suit is brought, was paid on checks drawn on the respondent bank and signed by appellant as treasurer of the Macon Athletic Club. The suit, however, is not on the checks, nor on a debt claimed to exist against the Macon Athletic Club by

Digitized by Google

reason of the payment of said checks. It is upon an alleged oral promise and agreement said to have been made by appellant to and with respondent that, if it would pay the money on said checks, appellant would repay respondent. Respondent, having thereafter paid the sum sued for, now sues the appellant for reimbursement according to the alleged promise.

The Macon Athletic Club was a corporation organized to maintain a baseball club and give baseball games at Macon. This was one of the towns in a baseball circuit established for the purpose of having games in each town in said circuit. The defendant was treasurer of said Macon Athletic Club, and was engaged in running a pool hall in Macon. As the baseball games usually drew large crowds to town, defendant was interested in seeing the club maintained and the games kept up because the business of the pool hall was thereby increased.

To defray the expenses of the club appellant, as treasurer thereof, drew checks on the respondent bank although the club had no funds in the bank to pay them. When these checks reached the bank, payment on them was refused and an officer of the bank went to appellant and told him that the respondent would not pay the checks because the club had no funds. The appellant, according to this officer's testimony, told said officer, that he had given still other checks which had not come in yet, and that he wanted all of the checks paid and he himself would pay respondent the money used in paying them. Relying upon said agreement and looking wholly to him for the money, respondent then paid out the money called for by said checks, to the amount sued for.

The questions whether defendant made the agreement, alleged, and whether plaintiff paid the money out in reliance entirely upon said agreement, if any, were submitted to the jury in appropriate instructions. The jury were also instructed that if the defendant only

Digitized by Google

promised that he would pay if the Macon Athletic Club did not, or, if the plaintiff relied upon the credit of the Macon Athletic Club and not solely on the alleged promise of defendant, then the finding must be for defendant.

The jury returned a verdict for plaintiff in the sum of $279.50 which was reduced by a remittitur entered by plaintiff to $244.60 for which sum judgment was rendered. Defendant appealed.

It is urged by defendant that the debt sued for was created by the checks of the Macon Athletic Club and when the bank paid out the money on them it thereby accepted said checks and they became written contracts, and evidence of any prior or contemporaneous agreement cannot be admitted to vary or contradict them. But the debt herein sued for was not created by, nor does it rest upon, the checks. It was created by the agreement of defendant to pay plaintiff the money paid out at defendant's request, and the only function the checks performed was to evidence the amount of such request. The suit was not on the checks nor was it upon a debt due from the Macon Athletic Club, but upon a debt created by defendant himself by virtue of his agreement to pay plaintiff the money it thereafter advanced. The question whether it was upon a debt due from the Macon Athletic Club, and also whether the agreement was merely to pay if the club did not, or whether it was that the defendant himself would pay, and that sole reliance was had thereon, were all submitted to the jury and it found that the debt created and sued upon was wholly that of the defendant. In such case the Statute of Frauds does not apply. [Chick v. Frey Coal Co., 78 Mo. App. 234.] There is a vast difference between telling a merchant, "Let this man have what goods he wants and I will pay you for them" and telling him, "If this man doesn't pay you for the goods he has bought I will." In the first statement, the one making it is

Digitized by Google

creating an original undertaking in which he makes the debt entirely his if the merchant relies wholly upon his promise, and the Statute of Frauds has nothing to do with it. In the second statement, the one making it is agreeing to answer for the debt of another, and, by reason of the Statute of Frauds, he cannot be bound thereby. In the former case the one so telling the merchant is liable even though the goods are, solely for convenience, charged to the man who receives them where it appears the merchant did not look to him for pay. [Newton Grain Co. v. Pierce, 106 Mo. App. 200, 29 Am. & Eng. Ency. of Law (2 Ed.), 920.] If the agreement alleged was an original undertaking and was not a promise to pay the debt of another, and credit was not in fact extended to the club, then the fact that for convenience of bookkeeping the checks paid were kept on the books as an account of the club will not defeat plaintiff's claim, nor will the Statute of Frauds do so. [Hill Bros. v. Bank of Seneca, 100 Mo. App. 230.] Such bookkeeping is a circumstance bearing on the question whether credit was given to the club or not, but it is not conclusive of that fact. [29 Am. & Eng. Ency. of Law (2 Ed.), 925.] And it is for the jury to say whether the defendant assumed the attitude of principal or stood merely as a security for the club. [Kansas City, etc., Co. v. Smith, 36 Mo. App. 608; Chick v. Frey Coal Co., 78 Mo. App. 234.]

It is earnestly contended that the evidence is not sufficient to show an original undertaking on the part of defendant to pay respondent, and that on the contrary the plaintiff's course of dealing showed it looked to the Macon Athletic Club for its money. As the finding of the jury upon these questions is in favor of plaintiff, we cannot overturn that verdict if there is any evidence at all in support of it. There was sufficient evidence to show that defendant agreed to pay the amount of the checks when they were refused by

Digitized by Google

the bank, and that upon defendant's agreement to pay, the checks were cashed.

It is true that after the bank paid out the money on the agreement made with the bank officer, Brown, another of the bank's officers, Harry M. Rubey, saw defendant and asked him about the overdraft, and this officer testified that defendant told him he would pay the overdraft personally if the club didn't pay it, and that he would guarantee it himself. But this was after the agreement to pay had been made with the cashier, Brown and defendant could not afterwards change or limit his contract theretofore made by saying then that he would pay only in case the club didn't pay. At that time credit had been refused the club and was extended to defendant only upon his promise to pay.

The course of dealing relied upon as showing conclusively that the bank did look to the club for payment is the fact that, more than a month after the money had been paid out by the bank, a deed of trust was executed by the club to the bank on its park and grandstand. But the evidence shows that this deed of trust was not sought by the bank nor was it accepted as in payment of the debt. The president of the club and the president of the bank both swore that the deed of trust was offered by the club to the bank, and that when this was done both the club and the bank knew that the lien of the deed of trust amounted to little or nothing owing to prior liens, and that the bank finally agreed to take it with the understanding that if anything was realized out of the sale of the club's meagre assets under said prior liens, and over and above said liens, the bank would receive and apply it on the debt. This was not an extension of credit to the club, nor did it conclusively show that when the bank paid out the money it was relying on the club, in part or in whole, for repayment instead of on the defendant. At most it was but a circumstance to be

Digitized by Google

considered by the jury in determining whether credit was extended to the club or not. If the deed of trust was taken upon the terms stated, then it was merely an act in defendant's favor done to assist him in reducing the debt as far as possible. This question of the terms on which the deed of trust was received was also submitted to the jury by proper instructions. Under all the circumstances this question and the questions of whether or not the defendant's agreement was an original undertaking and whether or not credit was extended solely to him were for the jury; and were submitted to the jury by instructions on both sides, and we are not warranted in disturbing its verdict.

The judgment is affirmed. All concur.

LAURA PRICE, Respondent, v. THE CITY OF MARYVILLE, Appellant.

Kansas City Court of Appeals, December 1, 1913.

1. **NEGLIGENCE: Damages: Depression in Sidewalk: Actionable Defect: Liability of City.** While it is true that not every depression or uneven place in a sidewalk will constitute an actionable defect, yet a sunken place or a step-off therein, caused by the washing out of the dirt underneath a flagstone in a walk over a drain tile so that the stones sunk down a distance of six to eight inches at one side and the center stone was two inches lower than the stones on either side, will constitute a defect for which the city will be liable if such condition has remained a sufficient length of time before an injury, and the injured person is in the exercise of ordinary care.

2. **———: Evidence: Variance.** Where there was evidence that plaintiff was on the walk in the nighttime and stepped into a defective place therein causing her to lose her balance and fall into an open ditch at the side of the walk there is no variance between the petition and the proof. Whether plaintiff fell from the walk into the ditch because of the defect or negligently walked into the ditch was for the jury to decide.

Digitized by Google

3. **PLEADING: Sufficiency of Petition. Objection to Introduction of Evidence.** An objection to the introduction of evidence is not effective against a petition which states any cause of action however defectively. Against such an objection every intendment will be indulged in favor of the petition.

4. ———: ———: ———. A petition cannot be said to state no cause of action because it fails to set out an actionable defect where the defect described is sufficient to suggest to the mind of an ordinarily prudent man that it was dangerous, and did not result from a reasonably safe plan of construction made necessary by surrounding conditions.

5. **INSTRUCTIONS: Care Required of Plaintiff.** Where a number of instructions telling the jury the care required of plaintiff before she was entitled to recover were given, some of them on one side and at least one on the other, it was not error to refuse another.

Appeal from Nodaway Circuit Court.—*Hon. Wm. C. Ellison,* Judge.

AFFIRMED.

W. E. Wiles, and *W. H. Crawford* for appellant.

Cook, Cummins & Dawson for respondent.

TRIMBLE, J.—An action for damages from a fall caused by an alleged defect in a street crossing. The petition charges that the walk or crossing, at the point in question, was in an unsafe and dangerous condition in that the earth under said crossing or walk at said point had washed away allowing the walk to sink so as to leave a depression or sunken place which would cause persons stepping into same to fall and injure themselves; that this condition had existed for such a length of time prior to the injury that the city knew of it, or, by the exercise of ordinary care, might have discovered it and by ordinary diligence might have repaired said walk before plaintiff got hurt; and that the city was negligent in permitting the walk to remain in such condition; that plaintiff, while walking on said walk, after dark and using due care, stepped into said sunken place and was thrown down and thereby

Digitized by Google

injured. The answer was a general denial and a plea of contributory negligence.

It is admitted that plaintiff was seriously injured as a result of her fall, that the walk or crossing had been in a more or less defective condition for a long time prior to the injury, and the city treasurer had notified the mayor of such condition about a week or ten days before plaintiff fell. There are but two questions of fact left in dispute, to-wit: Was the walk reasonably safe for travel; and was plaintiff in the exercise of due care?

The walk extended north across an east and west street and lay on the west side of the intersection of this street with another running north and south. Along the south side of this intersection, and running east and west, a twelve inch drain tile had been laid three feet under ground. It extended west to the west line of the north and south crossing-walk in question. The ditch in which the drain tile lay was filled and the tile of course covered, but, from the west edge of the walk on west, the ditch was open. The walk was made of brick where it crossed the central or wagon-traveled portion of the street, but from thence south across the parking of the street and over this drain tile, a distance of about fifteen feet, to the sidewalk running east and west, the crossing walk was made of flagstones. These were about four feet long and two feet wide, and were laid lengthwise east and west, making the walk four feet wide. Two of these flagstones lay over this filled ditch, one of them directly over the drain tile. The west end of the tile was under them or stopped flush with the west end of said stones. Thus there was an open unprotected ditch three feet deep extending west from the west edge of said walk or crossing over this drain tile. The space over the tile and underneath the stones had been filled with rock, sand, and gravel, to the depth required to maintain the flagstones over the drain tile in proper place. A twelve

Digitized by Google

inch board had been set up edgewise at the west end of and flush with the edge and surface of said flagstones to hold this filling material under the stones in proper place.

A long time prior to plaintiff's fall the filling under the two flagstones had washed out, and this caused the two stones to settle down at their west end. This left a sudden step-off or depression in the walk, the depth of which was disputed. But, as there was evidence from which the jury could find that it was from six to eight inches in depth, and, as the verdict was for plaintiff, we must accept the depth of the step-off as being six or eight inches, and the walk as dangerous and unsafe.

On a November night after dark the plaintiff, in going to call on a friend, was walking south on the walk in question when her right foot stepped into what she termed "some low place" causing her to lose her balance and fall into the ditch. She testified that she was on the walk over the tiling at the time she stepped into the depression and that she did not fall face foremost into the ditch but lengthwise thereof. She was not acquainted with the crossing, not having occasion to travel it; she had been down in that locality about a month before that in the daytime but did not know that she crossed on that walk, and at any rate did not know of its condition. The board located at the west edge of the walk extended above the flagstones, and, on cross-examination, when asked if she struck said board when she fell into the ditch, she said she didn't know, as it happened so quickly.

The objection is made that the petition fails to state a cause of action. No demurrer was filed, nor motion to have the petition made more definite and certain. The objection was merely to the introduction of any evidence under the petition because it failed to state a cause of action. An objection made in this manner is not effective against a petition which states

Digitized by Google

a cause of action however defectively. Such an objection can prevail only when the petition wholly fails to state any cause of action. Against such an objection every reasonable intendment which the allegations of the petition will justify must be made in favor of the petition. [Smith v. Wabash Railroad Co., 129 Mo. App. 413, l. c. 422; State ex rel. v. Delaney, 122 Mo. App. 239, l. c. 243.]

The point is made, however, that the petition wholly failed to state any cause of action because "a mere sinking down of the crossing or unevenness in it does not constitute an actionable defect." The cases cited do not sustain such a broad proposition. It is true cities are not required to make their sidewalks level and without incline or grade regardless of the topography. And where a sidewalk is not negligently constructed nor allowed to become unsafe or dangerous, an injury caused by a mere *slant* in the walk is not actionable. Neither is a city liable for a step-off rendered necessary in the construction of a walk, and which is maintained in a reasonably and ordinarily safe condition, and the plan of construction is not manifestly unsafe. But the defect complained of here is not a step-off resulting from the plan of construction and made necessary by the surrounding conditions or topography, nor was it a mere slant in the walk, as was the fact in the cases cited in support of the proposition contended for. Nor was it a mere rounded depression so slight as not to suggest to the mind of an ordinarily prudent and careful man that it was dangerous, as was the case in Hamilton v. Buffalo, 173 N. Y. 72. In said case, also, the fall occurred in the daytime and the person falling knew of the depression but it was not sufficient to cause him to think of it as dangerous. In the case at bar, the fall occurred at night, the plaintiff did not know of the "low place" or step-off; and it was of such extent and character as to cause the treasurer of said city to report its exist-

Digitized by Google

ence to the mayor. And other persons in the vicinity had avoided crossing on the walk because of its condition.

It is next urged that the demurrer to plaintiff's evidence should have been sustained because there was a fatal variance between the allegations of the petition and the proof. This is on the theory that the petition alleged a defect in the walk and a fall thereon, while the evidence shows that plaintiff did not fall by reason of stepping into a defect in the walk, but that she fell because she carelessly walked into the ditch. A careful examination of the evidence in plaintiff's behalf discloses that she was not only on the walk but that she stepped into a "low place" on the walk just over the drain tile and opposite the end of the open ditch. And while some of the witnesses say the depression was "not more than an inch or two" their evidence discloses that what they really testified to was that the rock over the drain tile had sunk down at the west end some six or eight inches, and that the middle rock had sunk down until there was a drop of two inches at the edges thereof, that is, that the middle rock over the drain tile had sunk two inches lower than the flagstones on either side of the center stone. Under these circumstances, and in view of the jury's verdict, we cannot say that, as matter of law, the defect in the walk was not an actionable one, nor can it be said that there was a variance in the proof, or that the evidence conclusively shows that plaintiff merely walked into the ditch instead of falling from the walk into the ditch as a result of stepping into the depression. A step-off of only two inches at the center rock in *this particular place* and under the surroundings shown herein, would be sufficient to cause one walking in the dark, and not expecting it, to lose his balance and fall. At least it would be sufficient to require the question of the reasonable safety of the walk to be submitted to a jury.

Digitized by Google

Complaint is made of the refusal of defendant's instruction No. 5. This instruction bore on the question of the care required of plaintiff in walking over said walk. In four given instructions, three for the plaintiff and one for the defendant, the jury was told that plaintiff could recover only in case she was in the exercise of the care and caution that an ordinarily prudent person would exercise under like conditions and circumstances, and that she could not recover if she walked over the crossing in a negligent manner. Instruction No. 5 could, therefore, have been properly refused as being already covered by other given instructions. While it is true, an instruction in perhaps similar terms was held not to be erroneous in Ryan v. Kansas City, 232 Mo. 271, and the court refused to reverse the case because it was given, yet this is not a holding that a case should be reversed for failure to give such instruction when the question of the care required of plaintiff has been fully covered by other instructions. A close study of the language used by GRAVES, J., in the Ryan case, discloses that what is really decided is that the necessity of a citizen to use reasonable diligence to discover defects, is a part of and is included in the ordinary care always required, and not that the citizen must travel with his eyes glued to the sidewalk in order to discover defects not readily nor easily discernible; hence, as the instruction covered no more than ordinary care, it was not error to give it. And as such an instruction covers no more than the ordinary care required of persons using the streets, it is also not error to refuse it when other instructions have been given covering that point.

The other assignments of error are but amplifications of those hereinbefore considered.

The case was properly tried and we are unable to find any substantial reason for disturbing the verdict. The judgment is therefore affirmed. All concur.

Digitized by Google

JAMES A. HATFIELD, Respondent, v. L. A. SWIFT, Appellant.

Kansas City Court of Appeals, December 1, 1913.

1. **PRACTICE, APPELLATE: Verdict: Substantial Evidence.** If there is any substantial evidence to support a verdict an appellate court will not disturb the judgment rendered thereon.

2. **INSTRUCTIONS: Employment: Individual.** Where it is conceded that a defendant employed the plaintiff to render services, but contended that the employment was for others and not individually, an instruction which omits to submit whether plaintiff knew defendant was not acting for himself is erroneous.

Appeal from Buchanan Circuit Court.—*Hon. W. K. Amick,* Judge.

AFFIRMED.

John E. Dolman and *Joseph McDonald* for appellant.

Mytton & Parkinson for respondent.

ELLISON, P. J.—This is an action on an account for services alleged to have been rendered to defendant at his request. The judgment in the trial court was for plaintiff.

In view of our obligation to stand by the verdict of a jury when it is supported by any substantial evidence, we do not discover any good reason upon which to base this appeal. Defendant makes a statement in detail of the connection which he had with the St. Joseph Stockyards and of the doings of the Blair Horse and Mule Company and the Ben Miller Mule Company, showing the latter quit business in debt to the former, etc.; and that plaintiff had been its employee up to the time it ceased business.

Plaintiff's statement sets out that defendant was a large stockholder in the Stockyards Bank in St. Joseph which "financed" the above companies.

Digitized by Google

While these matters may have had their proper place in giving a right understanding to the jury and enabling it the better to judge between the conflicting statements of the parties as appeared in their testimony, the important fact controlling us is, that there was abundant evidence in plaintiff's behalf that defendant personally employed him and agreed to pay him $100 per month and the jury so found. We must sustain the judgment rendered on the verdict unless there is error in refusing two instructions offered by defendant.

Of these, the first starts out with the erroneous statement that although defendant told plaintiff to take charge of or look after what was known as the Ben Miller mules that statement of itself will not constitute a contract on the part of defendant individually." To have so characterized such acts, as a matter of law, would have been improper. It should have stated that such acts would constitute a contract if accepted by plaintiff, unless plaintiff knew he was acting for other parties. The instruction was likewise improper in the latter part in commenting or particularizing certain evidence.

Besides this all that defendant was entitled to on the subject of whether he was acting for himself or for others was embodied in the instruction which the court modified. It is true that complaint is made of that modification, but it is apparent to us that it was proper enough and could not have misled the jury. Furthermore, since these instructions are bottomed on the concession that defendant did employ plaintiff, the hypothesis that he must have made the employment for himself was improper, unaccompanied by the qualification that plaintiff knew defendant was not acting for himself. This fault would have justified the court in refusing entirely both instructions. The judgment was manifestly for the right party and is affirmed.

All concur.

Digitized by Google

EDWARD D. MARTIN, Appellant, v. W. R. HARRINGTON, Respondent.

Kansas City Court of Appeals, December 1, 1913.

1. **STATUTE OF FRAUDS: Consideration: Verbal Promise.** In order to take a verbal promise out of the Statute of Frauds requiring an agreement to pay the debt of another to be in writing, there must be some consideration moving to the promissor, unless the original debtor is released and the debt discharged.

2. **———: Discharge of Debt: Original Promise.** Where a third party promises a creditor to pay an existing debt of his debtor if the creditor will release the debtor and discharge the debt, and the creditor agrees and does it, the promissor's promise is an original undertaking and need not be in writing. In such case, the debt being discharged, there is no "debt of another person" and the Statute of Frauds does not apply.

3. **———: Demurrer: Procedure.** A demurrer is not the proper procedure to take advantage of the Statute of Frauds.

Appeal from Clinton Circuit Court.—*Hon. A. D. Burns,* Judge.

REVERSED AND REMANDED.

Daniel B. Gross and *W. S. Herndon* for appellant.

John A. Cross for respondent.

ELLISON, P. J.—Plaintiff's action is to recover $663.70 on an account. Defendant demurred to the petition on the ground that it did not state a cause of action. The trial court sustained the demurrer and plaintiff appealed.

The ground of the demurrer was that the petition stated the original debt was that of another person which defendant had promised to pay and that being the verbal promise to pay the debt of another it was void under the Statute of Frauds (Sec. 2783, R. S. 1909) providing that, "No action shall be brought to

Digitized by Google

charge . . . any person upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the agreement upon which the action shall be brought, or some note or memorandum thereof, shall be in writing," etc.

The parties have ignored the law that when an agreement involving the Statute of Frauds is alleged in a petition, it is not necessary that it should be alleged to be in writing, since it will be presumed the agreement stated is a legal one. There should have been an answer denying an agreement and then if the one proven is not in writing the statute may be invoked. A demurrer is not the way in which to obtain the benefit of the Statute of Frauds. [Phillips v. Hardenburg, 181 Mo. l. c. 472.] But as the same question will arise on a trial, we proceed to an examination of the matters involved.

It is alleged in the petition that J. C. Harrington being then indebted to plaintiff on the account defendant agreed with plaintiff that if the latter would "release and discharge J. C. Harrington from the payment of said debt he would pay said debt as his own." That plaintiff "accepted the agreement and did release the said debtor J. C. Harrington."

The case presents a vexed question arising from conflict in the decisions. It is of course, agreed by all that there must be a consideration to support the third party's promise. Ordinarily a consideration may be made up of either benefit to the promisor, or of harm to the promisee; but in cases under this statute it is stoutly maintained that the latter consideration does not avail as a support to a verbal promise to pay the debt of another, in the face of the statute requiring it to be in writing. The ruling is that, in order to make the statute inapplicable, the object of the promise must be some benefit to the promisor, the payment of the original debtor's debt being a mere incident. It is stated in these words in a leading case:

Digitized by Google

"The rule to be derived from the decisions seems to be this, that cases are not considered as coming within the statute, when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute." [Nelson v. Boynton, 3 Met. 396.] The same rule is announced in Cowenhoven v. Howell, 36 N. J. L. 323, the court emphasizing it in these words: "The consequence is, that agreements which will have the effect to discharge the debt of another, must be founded in a motive of interest, selfish in the promisor. The distinction is between a promise, the object of which is to promote the interest of another and one in which the the object is to promote the interest of the party making the promise. The former is within the operation of the statute. The latter is unaffected by it." Chancellor Kent divided the cases into three classes and this was his statement of the third class: "When the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties;" (Leanord v. Vredenburgh, 8 Johns. 29). That statement has been questioned on the ground that it includes harm to the creditor as constituting a sufficient consideration. In Farley v. Cleveland, 4 Cowen, 42, the statement of Chancellor Kent is approved, but it is restated (p. 439) in language which we take to be an intimation of the way in which the rule, as stated by the chancellor, should be interpreted; thus, "In all these cases founded upon a new and original consideration of benefit to the defendant, either from the plaintiff, or the original debtor, the subsisting liability of the debtor is no objection to the recovery." Thus, though the court approved of what Kent had said, it takes the pains to say that the consideration of harm to the

Digitized by Google

creditor must be such character of harm as moves to or benefits the promisor. And this, we think is the interpretation put upon it in Nelson v. Boynton, supra, and Mallory v. Gillett, 21 N. Y. 412, 419. So we may regard the effect of the rule to be that the consideration which will withdraw the protection of the statute from the defendant's verbal promise is a consideration which moves to or is of benefit to him and when it is said that the consideration may consist of harm to the promisee plaintiff, it means a harm that has benefited the promissor. To say that any consideration will take a promise based thereon out of the statute is to make the statute useless. For if there is no consideration the promise is invalid without the statute. The statute is aimed at what were valid contracts; that is to say, it makes invalid contracts not in writing which would otherwise have been valid. So the St. Louis Court of Appeals has said that the main object of the verbal promisor must not be to pay the debt, but to benefit himself. [Walther v. Merrell, 6 Mo. App. 70.] And this, in effect, is the view of the Supreme Court. [Besshears v. Rowe, 46 Mo. 501.]

But in numberless instances cases arise thought to be within the statute and which are so confusingly near to it as to require close scrutiny, to discover the dividing line. The statute invalidates a verbal promise to pay the debt of *another,* and it is frequently the hardest matter to determine whose debt is a given obligation. Although one party may be the cause of the debt he may not be the debtor, for the original obligation may rest upon a third party. As if the latter takes a person to a merchant and says let this man have certain goods and I will pay for them; there is an original indebtedness by the promissor and the contract is not to pay the debt of the man who gets the goods but his own. Many illustrations might be given. In this illustration the debt never existed against the party getting the goods.

Digitized by Google

But there are instances where the debt may exist against the debtor and a third party, in consideration that the creditor releases it, verbally promises to pay it. That is the case now before us. Now in such instance the debt, being discharged, no longer exists and the third party's promise to the creditor is not to pay the debt of another, but he has created a debt of his own to the creditor; and though the effect is to wipe out the debt of the debtor, the fact is that he has substituted himself in the debtor's place (the latter being no further concerned) the consideration being the release between the creditor and the original debtor, and not a benefit to the promissor. Thus the promise is not to pay the debt of another. And by an examination of the authorities above cited, it will be found that the courts qualify the rule by the express statement that the debt of the original debtor was still subsisting. Thus in Cowenhoven v. Howell, supra, the court, after announcing the rule that there must be a consideration moving to the promissor, adds the cautionary qualification, "that the rule above adopted is not applicable to that class of affairs where the effect of the new promise is to extinguish the liability of the original party before the obligation of the new promise attaches."

But we need not depend upon the foregoing cases having made that qualification in cases where the question was not directly up for decision. There is abundant authority where the question was directly involved. And while some may treat the question of consideration for the promise differently from others, all agree that if, the new promise is in fact made on the discharge by the creditor of the original debtor, that that debt is gone and a new one created with a substituted debtor. [Underwood v. Lovelace, 61 Ala. 155; Whittemore v. Wentworth, 76 Maine, 20; Brown v. Weber, 38 N. Y. 187, 191; Fain v. Turner, 96 Ky. 634, 638; Wood v. Corcoran, 1 Allen, 405; Packer v. Ben-

Digitized by Google

ton, 35 Conn. 343.] In the latter case this condition of contract is stated to be necessary to the application of the statute, viz. (italics the court's): "An undertaking by a person *not before liable,* for the *purpose* of securing or performing the *same* duty for which the party for whom the undertaking is made *continues* liable." That is to say, if the original debtor is discharged—does not *continue* liable after the promisor's promise—the statute does not apply. And this is the law as stated in Browne on the Statute of Frauds, sec. 193. And it is in accord with our ruling in Brown v. Corey, 74 Mo. App. 462, and the rule stated in 29 American and English Ency. of Law, 912.

We find the same interpretation of the statute is given in England. In Goodman v. Chase, 1 B. & Ald. 297, there were two arguments after which Lord ELLENBOROUGH stated the opinion of the court as follows: "By the discharge of Chase Junior with the plaintiff's consent, the debt as between those two persons was satisfied. No case can be cited in which such a discharge has not been held quite sufficient. Then if so, the promise by the defendant here is not a collateral but an original promise, for which the consideration is the discharge of the debt as between the plaintiff and Chase Junior. That being so, it becomes wholly unnecessary to consider the question arising out of the construction of the fourth section of the Statute of Frauds."

In Sane v. Burghart, 1 Q. B. 933, the original debtor was discharged by the creditor in consideration of which Burghart agreed to pay the debt and it was held to be an original undertaking by him to the creditor to which the statute did not comply.

The foregoing considerations demonstrate that the petition stated a case not within the statute and that therefore the demurrer should have been overruled. The judgment is reversed and the cause remanded.

All concur.

Digitized by Google

CALEB WINFREY, Respondent, v. T. A. MATTHEWS, Appellant.

Kansas City Court of Appeals, December 1, 1913.

1. **PRACTICE, TRIAL: Instructions: Finding Conclusive.** Where a jury is waived and cause submitted to the court without declarations of law, if there is any substantial evidence to support the finding it will be upheld on appeal; and if there is any theory of law under the evidence and pleading which will support the judgment it will be affirmed.

2. **BILLS AND NOTES: Payment: Burden.** On a plea of payment, the notes being admitted, the burden is on the defendant to sustain his plea.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell,* Judge.

AFFIRMED.

J. H. Hawthorne and *S. L. Mathews* for appellant.

Isaac Tavenner and *A. R. Strother* for respondent.

ELLISON, P. J.—This action is based on eleven promissory notes. The defense was payment, and a counterclaim, but the latter was abandoned. The judgment in the trial court was for the plaintiff.

A jury was waived and the case was submitted to the trial court without any declarations of law being asked or given. We find it impossible to sustain this appeal without violating fundamental rules of law, viz., that where a jury is waived and no declarations given, the court is intrusted with the decision of both law and fact and if any substantial evidence supports the finding on the facts and if any theory of the law will support the judgment under the evidence and the pleading, there is no ground for appeal. [State ex rel. v. Staed, 143 Mo. 248; Sommer v. Boyson, 168 Mo. App. 335; Rice v. McCluer, 74 Mo. App. 383.]

Digitized by Google

The plea of payment put the burden on defendant to prove it. [Ferguson v. Dalton, 158 Mo. 323; Rider v. Culp, 68 Mo. App. 527.]

It is insisted in defendant's briefs that improper evidence was admitted, in that it concerned matters pertaining to a compromise. That was not stated to the trial court as a ground of objection. And it therefore does not give defendant ground for complaint on appeal. But waiving that, we think the evidence was entirely proper in every respect.

Objection was made to the admission of a pencil memorandum of statements made by defendant in the latter's presence. The ground of objection was that counsel "could not see how it has anything to do with this matter." We think it was directly pertinent to the case and the objection was properly overruled.

The alleged payments on the notes were said to consist, among other things, of a variety of business transactions and services rendered by defendant. That plaintiff and defendant owned an interest in a fruit farm in Howell county. And that defendant bought of plaintiff a half interest in a hardware store and that defendant took charge of it and was to be credited on one of the notes for his services. That they sold the store and that plaintiff collected all the purchase price agreeing to credit defendant. That defendant paid all of a joint note they owed and was to receive credit from plaintiff for one-half thereof. There is no need of further specification. Nor is there any necessity to set out evidence in detail and we need only say that if that for plaintiff is to be believed the judgment was properly rendered for him. We think the error made by defendant is in considering the evidence in his behalf, under the rule above stated, whereas, with the finding against him, it is only evidence for the plaintiff we need consider.

The judgment must be affirmed. All concur.

Digitized by Google

CLAUDE REA, Respondent, v. VIRGINIA B. REA, Appellant.

Kansas City Court of Appeals, December 1, 1913.

1. **DIVORCE: Indignities: Evidence.** Evidence of the wife's conduct in receiving the visits of men in the absence of her husband, and corresponding with men, though falling short of proof of adultery, will sustain a charge of indignities and entitle the husband to a divorce.
2. **———: Adultery: Indignities: Amendment: Evidence.** Where a petition for divorce contained a charge of adultery and of indignities, the trial court may properly permit an amendment after the evidence is heard striking out the adultery charge and making more specific the charge of indignities so as to conform to the proof. And in such case, it is not error to refuse to permit defendant to introduce further evidence.
3. **———: Amendment: Reverification.** In a divorce proceeding where an amended petition is filed not setting up new causes, but merely amplifying those already alleged, it need not be reverified by affidavit.

Appeal from Andrew Circuit Court.—*Hon. A. D. Burns,* Judge.

AFFIRMED.

W. H. Hayes and *Booher & Williams* for appellant.

Shannabarger, Blagg & Ellison for respondent.

ELLISON, P. J.—Plaintiff's action is for divorce. He obtained a decree in the trial court on the ground of indignities and incompatibility of temper.

The evidence disclosed that plaintiff had a daughter, Ruth, by a former marriage who at the period of this controversy was between fourteen and fifteen years of age. She lived with plaintiff and defendant on a farm in Andrew county. Plaintiff was a traveling salesman of merchandise and was absent perhaps

Digitized by Google

five days in the week, the farm being managed during his absence by defendant and hired men. The indignities charged against defendant are her improper conduct with one of these men (though not amounting to adultery) and the example set to the young daughter which plaintiff feared might have a corrupting influence as she grew older.

It was shown by a preponderance of the evidence that defendant permitted one Beatty, who was one of the employees on the farm, who lived near-by, to visit her, and, at times, to caress her. There was other evidence that she wrote him notes and that when finally plaintiff took his daughter away for the reason that he believed she was in danger of evil influences and surroundings she said to the daughter that "If you won't tell on me I won't tell on you." There was also evidence that she admitted in the presence of others to an ungovernable temper which had led her into unjust treatment of her husband. We can see no good to be accomplished in setting out all this evidence in detail and no good reason for doing more than to say that the preponderance of evidence in plaintiff's behalf has induced the trial judge to find that the indignities charged were sustained, and that while that finding is not binding on this court, yet it properly has a very persuasive influence and should be deferred to by us. [Herriford v. Herriford, 169 Mo. App. 641.]

There is, however, a legal question presented which requires our attention. The petition originally contained a charge of adultery, and also a charge of indignities in that she sought the companionship and society of male companions while he was absent from home and without his knowledge; and that she carried on a secret correspondence with Beatty and permitted him to call on her during plaintiff's absence.

At the close of the evidence the court took the case under advisement and afterwards announced that the charge of adultery had not been sustained and

Digitized by Google

ought to be withdrawn and that the petition should be amended as to the charges of indignities. This was done by amendment. The charge of indignities was made more specific, and included that of defendant permitting the younger daughter to have company until late at night and that Beatty had one time caressed the daughter. When this amendment was made defendant asked to be allowed to introduce more evidence and the court refused the request.

We think the amendment to the petition was nothing more than an allowance of an amendment for the purpose of conforming to the proof. It is a common practice in ordinary cases and no reason exists why it should not be done in an action for divorce. [Rose v. Rose, 129 Mo. App. 175; Garver v. Garver, 145 Mo. App. 353.] As to the introduction of further evidence as requested by defendant, we find no reason to interfere with the trial court. The matters specified in the amendment had all been contested under the original petition, the defendant at no time objecting to the evidence taking the scope it did. So that the refusal to open up what had been already fully contested was not improper.

Another ground of objection is that the petition after the amendment was not again sworn to. That point has also been ruled against defendant. The affidavit is jurisdictional (Hinkle v. Lovelace, 204 Mo. 208; Stevens v. Stevens, 170 Mo. App. 322), but where the cause of action is not changed and where no new cause of action is introduced; where, as here, the amendment introduces no new cause of divorce but only an amplification of what was already charged, there is no necessity for renewing the affidavit. [Garver v. Garver, supra; Tackaberry v. Tackaberry, 101 Mich. 102; Colant v. Jones, 120 Ga. 568, 570.]

We think the trial court properly found against the defendant's cross bill and we affirm the judgment granting plaintiff a divorce. All concur.

Digitized by Google

EXCELSIOR STOVE MANUFACTURING COMPANY, Appellant, v. MARK M. MILLION, Respondent.

Kansas City Court of Appeals, December 1, 1913.

1. **ACCOUNTS: Counterclaim: Statute.** The plaintiff sued on an account in a justice court for stoves sold and delivered to defendant. The latter not only refused to pay, but filed a counterclaim for damages for breach of contract and warranty and loss of business. The cause was appealed to the circuit court and upon trial, the defendant was allowed, over the objection of the plaintiff, to amend his counterclaim by striking out the item of damages resulting from loss of business and by inserting a new demand for freight charges. *Held*, that a counterclaim may be amended in the circuit court, under Sec. 7586, R. S. 1909, but not so as to change the cause of action nor add a new cause to that originally pleaded.

2. **———: ———: Breach of Warranty: Remedies.** Where the vendor has been guilty of a breach of warranty the vendee has two remedies: First, he may recover the difference in value between the chattel as warranted, and its actual value in its defective condition; or he may, within a reasonable time, reject and return the chattel to the vendor and maintain an action for the recovery of the full amount paid on the purchase price.

Appeal from Buchanan Circuit Court.—*Hon. Wm. D. Rusk*, Judge.

REVERSED AND REMANDED.

Warren Rodgers for appellant.

A. Bowers for respondent.

JOHNSON, J.—In July, 1912, plaintiff, a manufacturer of stoves in Quincy, Illinois, sued defendant in a justice court upon an account for stoves delivered in March, 1908, to defendant who, at that time, was a retail merchant in Sheridan, Missouri. The total value of the stoves as shown by the itemized account attached to plaintiff's statement was $245.97 and the

Digitized by Google

suit was for the recovery of that amount less a credit of $48.55, paid on the account June 19, 1909.

Defendant appeared in answer to the summons and filed the following counterclaim: "The defendant for his counterclaim and cause of action against said plaintiff alleges and says that said plaintiff sold defendant several cook stoves upon a warranty that said stoves were good stoves and would give good satisfaction. That the defendant relying upon said warranty sold one of said stoves to Jesse Grace. That said stove was not a good stove and did not give satisfaction and after said Grace had tried said stove and it failed, defendant notified said company and they undertook to put said stove in order and undertook to make it do good work and could not. That said Grace sued said Million in the justice court at Sheridan, Mo., for the purchase price, to-wit: Forty-five dollars and in said court in Sheridan, Mo., recovered judgment for said purchase price for forty-five dollars and costs $19.55, all of which defendant paid. That defendant paid fifty dollars for attorney fees to defend said suit.

"That by reason of plaintiff's breach of contract and warranty as aforesaid defendant was damaged in loss of business in the sum of $200. Wherefore defendant asks judgment against plaintiff for costs paid, $19.55, attorney fees paid fifty dollars, and for damages, $200, in the total sum of $269.55 and costs."

After the cause was appealed to the circuit court, defendant, over the objection of plaintiff, was permitted to amend his counterclaim by striking out the item for damages resulting from loss of business and by inserting a new demand for twenty-five dollars, the amount defendant had paid for freight and drayage on the arrival of the stoves at Sheridan.

At the trial in the circuit court counsel for defendant admitted the account and assumed the burden of proof. Defendant was the only witness introduced

Digitized by Google

by either party and his testimony discloses the following facts. He gave an oral order for the stoves to a traveling salesman of plaintiff who warranted that they would be well made and would give good service. A similar printed warranty was placed by plaintiff in the oven of each stove for the benefit of defendant's customers. Defendant paid the freight and drayage on the stoves and placed them on sale in his store but did not make a sale until almost a year later when he sold one to Jesse Grace, a fellow townsman who paid the purchase price of forty-five dollars. The stove did not give good service and Grace complained to defendant who, in turn, complained to plaintiff.

This stove, in common with the others, appeared to be in good condition and serviceable but "it would not draw." A representative of plaintiff visited Sheridan in response to defendant's complaint and attempted to put the stove in serviceable shape but without success. Grace became importunate and demanded that the stove be taken back and his money refunded. Defendant referred the demand to plaintiff's agent who instructed him to refuse to rescind the sale and agreed that plaintiff would reimburse him for any outlay he might be compelled to make in defense of his customer's demand. Grace sued defendant as upon a rescinded sale and recovered a judgment for the purchase price and costs in the sum of $19.55. Defendant paid the judgment and also paid a fee of fifty dollars to an attorney he employed to defend the suit. The total loss he sustained on account of that suit was $69.55. He did not ask plaintiff to repay him, made no complaint that the other stoves were defective and did not offer to rescind the contract until more than a year after the termination of the Grace suit. He testified on cross-examination: "After that suit was over I never heard anything from them for a long while; they did not take it up. About a year after I sold out they notified a couple of attorneys, Kelso

Digitized by Google

and someone from Grant City, who came over and talked to me. I told them I would not pay it and told them why." . . . "Q. Now did you tell them that their traveling man had agreed to pay costs of suit or anything of that kind? A. Well, as I said, in writing to them I do not know whether I mentioned what he said or not."

On direct examination (referring as we understand to the conversation he had with the attorney plaintiff employed to collect the account), defendant said, "I told him there was his stoves now, that since the company had refused to pay this bill and would not stand back of their guarantee, I did not want them and absolutely refused to pay them a nickel."

At the request of defendant the court instructed the jury as follows: "1. If you find from the evidence in this case that the plaintiff sold defendant some cook stoves, for which this suit is brought, upon a contract to warrant the said stoves to give satisfaction to defendant's trade; that the defendant sold one of said stoves only; that said stoves were all alike in construction, and were worthless; that the stove so sold did not give satisfaction, by reason thereof the purchaser sued the defendant, and recovered judgment against him for the purchase price and costs; that the plaintiff knew about the suit and agreed to pay all costs and judgment that might be recovered against the defendant; and that in said suit said purchaser recovered a judgment against the defendant for the purchase price and for costs amounting to $19.—; that the defendant paid said costs and fifty dollars for attorney fees in said case; then your verdict should be for the defendant, for the amount of said costs and attorney fees, said fees not to exceed twenty-nine dollars, and also for such further sum, if any, as you may find that the defendant paid out for freight and drayage upon said stoves.

Digitized by Google

"2. If you find from the evidence in this case that plaintiff sold the stoves upon a warranty to give satisfaction to defendant's trade; that defendant sold only one of the cook stoves and that the one sold did not give satisfaction to such customer, then plaintiff was not bound to take any of said stoves, and that the plaintiff cannot recover from the defendant on said contract of sale.

"3. The court instructs the jury that if you find from the evidence in this case that plaintiff sold defendant stoves upon a warranty that the stoves should give satisfaction to defendant's customers; that the defendant sold only one of said stoves and that the same did not give satisfaction, then the defendant was not bound by his contract to take any of said stoves, and if you find that the defendant repudiated such contract, and tendered back to plaintiff the stoves, then your verdict will be for the defendant on the account."

Thus instructed the jury returned a verdict for defendant on the account and also for defendant on the counterclaim in the sum of $69.55. Afterwards defendant filed a remittitur of twenty-five dollars and judgment was entered for the amount of the verdict less the sum remitted. Plaintiff appealed.

The cause pleaded in the counterclaim filed in the justice court was not founded on a sale rescinded by the vendee on the ground of a breach of warranty by the vendor, but was for the recovery of the damages the vendee sustained in consequence of a breach of an express warranty. The rule is that where the vendor has been guilty of a breach of warranty the vendee has two remedies, viz.: He may take and keep the chattel and sue for damages growing out of the breach of warranty, in which case he may recover the difference in value between the chattel as warranted and its actual value in its defective condition; or he may, within a reasonable time, reject and return the chattel to the vendor and maintain an action for the recovery

Digitized by Google

of the full amount paid on the purchase price. [Laumeier v. Dolph, 145 Mo. App. l. c. 84, and cases cited.]

Defendant did not attempt to rescind the contract on account of finding a defective stove in the number delivered by plaintiff but elected, as his counterclaim clearly shows, to keep the stoves, and have recourse on plaintiff for damages he sustained from the breach of warranty. In such case he became bound to pay plaintiff the contract price of the stoves and became entitled to set up his damages by way of counterclaim. [Brown v. Weldon, 27 Mo. App. 251.]

In the counterclaim he filed in the justice court he restricted his damages to those resulting to him from the defective stove he sold to Grace and he should not have been allowed to enlarge his demand by amendment in the circuit court, and certainly should not have been allowed to go to the jury on the issue of a rescinded contract which was repugnant to the issues tendered by his pleading and evidence. The statute reads that "no set-off nor counterclaim shall be pleaded in the appellate court that was not pleaded before the justice." [Section 7586, Rev. Stat. 1909.] A counterclaim may be amended in the circuit court but not to change the cause of action nor add a new cause to that originally pleaded. Manifestly defendant would have been entitled to set up his whole damage resulting from the alleged breach, but he chose to plead only a single item and must be held to the ground of his own selection.

Under the admission of defendant that the account was correct, the jury should have been instructed to return a verdict for plaintiff in the amount of the account, and the only issues submitted under the counterclaim should have been those relating to the damages, if any, defendant sustained on account of the stove sold to Grace.

The judgment is reversed and the cause remanded. All concur.

Digitized by Google

JAMES McCASKEY, Respondent, v. QUINCY, OMAHA & KANSAS CITY RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, December 1, 1913.

1. **DAMAGES: Railroads: Fences.** When a railroad company negligently fails to maintain the kind of enclosure required by law, and, as a consequence of such negligence, an animal strays upon the track and is injured, the owner may recover damages thus inflicted upon him, though the manner of the injury may be outside the purview of the statutory remedies.

2. ———: ———: ———: **Statute.** The remedy provided in Sec. 3145, R. S. 1909, is not available to one whose horse was not injured by a locomotive or train, nor could he maintain an action under the succeeding section since his horse was not frightened or run by a passing locomotive or train.

Appeal from Sullivan Circuit Court.—*Hon. Fred Lamb,* Judge.

AFFIRMED.

D. M. Wilson, J. W. Clapp and *J. G. Trimble* for appellant.

Earl F. Nelson for respondent.

JOHNSON, J.—The appeal in this case is from a judgment plaintiff recovered in the circuit court of Sullivan county in an action for a breach by defendant of its duty to maintain lawful fences on the sides of its railroad where the same passes through the country. A horse owned by plaintiff escaped from a pasture, which was enclosed by a lawful fence, to a public road, traveled a mile or more along that road to a place where an opening in the fence on the north side afforded him access to a private road which ran north to and across defendant's railroad. There were no cattle guards at this crossing and a fence on the north side of the right

Digitized by Google

of way caused the horse, when he reached that barrier, to turn west and go along defendant's right of way. Finally he took to the track and then fell into a trestle bridge he attempted to cross. He was afterwards extricated by some section men but was so badly injured as to be rendered almost, if not entirely, worthless. The farmer who owned the land over which the private road passed maintained a lawful fence along the north side of the public road which ran east and west. There had been a gate at the place where the private road entered the public road but for sometime before the event in question the gate had been down and as defendant had no fence along the south side of its right of way, which was about 100 yards north of the public road and parallel thereto, there was nothing to prevent the horse from taking the course he pursued to the place of the injury. There is no evidence that the horse was frightened or run by a passing locomotive or train.

The petition contains two allegations of negligence, viz., first, that defendant failed to maintain a good and lawful fence and gate at the place where the horse entered upon the right of way, and second, that defendant's servants negligently injured the horse in removing it from the bridge. There is no proof of the second charge and it will be dismissed from our consideration with the observation that its inclusion in the petition could not affect the right of plaintiff to recover on the remaining charge if it states a good cause of action.

The gist of the action is negligence of defendant in the performance of the duty imposed by section 3145, Revised Statutes 1909, upon railroad companies to maintain lawful fences along the sides of their railroads where they run through the country. The remedy provided in that statute was not available to plaintiff since his horse was not injured by a locomotive or train, nor could plaintiff have maintained an ac-

Digitized by Google

tion under the succeeding section since the horse was not frightened or run by a passing locomotive or train.

But these statutory remedies so far as they relate to compensatory damages are cumulative, not exclusive. If a railroad company negligently fails to maintain the kind of enclosure required by law and in consequence of such negligence an animal strays upon the track and is injured, the owner may recover the damages thus inflicted upon him, though the manner of the injury may be outside the purview of the statutory remedies. An action will lie for the enforcement of a common law remedy for negligence in the performance of the statutory duty. [Oyler v. Railroad, 113 Mo. App. 375; Gorman v. Railroad, 26 Mo. 441; Hill v. Railroad, 49 Mo. App. 520; same case, 121 Mo. 477.]

The point made by defendant that it owed plaintiff no duty to provide a lawful barrier to prevent his horse from straying from the public road to the railroad has been so often ruled adversely to the position of defendant that we do not think its discussion here would be profitable. Reference to the following cases will disclose that the point is not well taken: Litton v. Railroad, 111 Mo. App. 140; Reed v. Railroad, 112 Mo. App. 575; Oyler v. Railroad, supra; Francis v. Railroad, 118 Mo. App. 435; Smith v. Railroad, 127 Mo. App. 160; Brown v. Railroad, 127 Mo. App. 614.

The judgment is affirmed. All concur.

Digitized by Google

GUS TRIPPENSEE, Respondent, v. CITY OF JEFFERSON, Appellant.

Kansas City Court of Appeals, December 1, 1913.

1. **PERSONAL INJURIES: Sewer Inlet: Defective Construction.** This is an action by plaintiff to recover compensation from the defendant city for personal injuries he sustained from falling into a sewer inlet in a public street. A sheet iron cover for the inlet became slightly and dangerously, but not noticeably, displaced, when the plaintiff following the ordinary course of a pedestrian stepped upon the cover, which gave way, causing his foot and leg to slip down into the sewer, whereby he was injured. There was evidence tending to show a defective construction of the hooks that held the cover in place. *Held*, that if an injury results from a danger inherent in the plan adopted, the city is not liable, but, if the danger has arisen from negligent construction or maintenance of the place, it is liable.

2. ———: ———: ———: **Notice.** Where, in the original construction of a sewer by the city of which it was charged with notice from the beginning, and which it was under a continuing duty to repair, actual or constructive notice of such defect is not necessary to render the city liable.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate*, Judge.

AFFIRMED.

Jas. H. Lay and *A. T. Dumm* for appellant.

Irwin & Peters for respondent.

JOHNSON, J.—Plaintiff sued defendant, a city of the third class, to recover damages for personal injuries he sustained from falling into a sewer inlet in one of the public streets. A sheet iron cover for the inlet became slightly and dangerously but not noticeably displaced in such manner that when plaintiff, who was following the ordinary course of pedestrian travel, stepped upon it, the cover gave way causing his foot

Digitized by Google

and leg to slip down into the sewer opening. The petition alleges that defendant was negligent in the construction, emplacement and maintenance of the cover in a position where it would be subjected to displacements that would make it unsafe to pedestrians.

The answer, in addition to a general denial, alleges contributory negligence and that the injury of plaintiff was due to a danger inherent in a general plan adopted by the city for the construction of such inlets and their covers.

A trial in the circuit court resulted in a verdict and judgment for plaintiff in the sum of two thousand dollars. Defendant appealed and contends that the court erred in refusing its request for a peremptory instruction. The injury occurred January 23, 1912, at the northeast corner of Broadway and High streets. Plaintiff and a companion walked west on the sidewalk on the north side of High street until they came to the corner just mentioned, when they turned south, intending to cross High street and walk along the east sidewalk on Broadway. There is evidence tending to show that the sewer opening was in High street near the corner and in the way of pedestrians. It was three feet long by two feet wide and was constructed of cement. The sheet iron cover was three feet long and two feet, one inch wide. The end which came to the top of the curbstone was provided with two iron straps bent down at the ends in the form of hooks which were placed over the inside of the curb to prevent the cover from slipping forward or falling down into the opening. The other end of the cover rested in the gutter at the outer edge of the opening. There is no space between the curb and sidewalk as a general rule in the defendant city but in this instance there was a washed-out place inside the curb that left it isolated with the result that there was nothing to prevent the cover from being pushed backward by the wheels of vehicles passing over its outer end, since the

Digitized by Google

hooks were left without the resistance to such pressure usually offered by the sidewalk between which and the curb they were designed to be inserted. The lack of this back wall also had the effect of making the cover more susceptible to lateral displacements resulting from side collisions with the wheels of passing vehicles. There is evidence tending to show that the cover had been slightly moved both backward and laterally, with the result that one corner of its outer end was in the air, over the concavity, so that the cover gave way at that side under the weight of plaintiff, causing his foot and leg to slide down into the sewer opening. It appears that covers of this type were in use at some other inlets in the city and we are willing to concede (though the proof of the fact is most unsatisfactory and unconvincing), that the employment of such covers was pursuant to a general plan of construction adopted by the city. But the evidence of plaintiff strongly tends to show that his injury was not caused by a defect or risk common to all covers of this type, but to a defect caused by the negligent manner in which the top end of the cover was attached to the curb—a defect peculiar to this particular structure. The rule is well settled in this State that "if an injury results from a danger inherent in the plan adopted the city is not liable, but if the danger has arisen from negligent construction or maintenance of the place, it is liable." [Gallagher v. Tipton, 133 Mo. App. 557; same case, 152 Mo. App. 412; Hays v. City, 159 Mo. App. 431; Nelson v. Kansas City, 170 Mo. App. 546; Ely v. St. Louis, 181 Mo. l. c. 729.] The act of the engineer in allowing hooks which were designed and intended to hold the cover in a fixed position to be placed where they could be freely moved backward or to either side was clearly ministerial and was in opposition to the obvious purposes of the general plan of construction adopted by the city while acting in its governmental capacity. The evidence does not show,

Digitized by Google

nor does the defendant contend here that plaintiff was guilty in law of contributory negligence. The court did not err in overruling the demurrer to the evidence.

Point is made that the court erred in refusing to instruct the jury that defendant was entitled to actual or constructive notice of the displacement of the cover. The displacement in issue appears from the evidence of plaintiff to have been, not the result of an accidental or wrongful act of another, but the natural consequence of negligence "in the original construction by the city of which it was charged with notice from the beginning and which it was under a continuing duty to repair." [Barr v. City, 105 Mo. l. c. 557.]

The evidence of defendant tends to show that the displacement was due to a cause inhering in a general plan of construction. If plaintiff is right (and the jury so decided) defendant had notice of the defect from the beginning. Under the hypothesis of defendant's evidence, notice of a defect due to adherence to a general plan could not have served to create a duty on the part of the city to remedy such defect. So it appears there could be no proper issue of notice in this case.

The objection to the instruction on the measure of damages is found to be not well taken. Nor do we find evidentiary support for the point of excessive verdict. The case was tried without prejudicial error.

Affirmed. All concur.

Digitized by Google

INDEX.

By JOHN M. CLEARY

ACCIDENT INSURANCE.

1. **Death by Accident: Sufficiency of Evidence.** In an action on an accident insurance policy, evidence *held* sufficient to establish that insured died from bodily injury effected through external, violent and accidental means, within the provisions of the policy. Goodes v. Order of U. C. T. of A., 330.

2. **Same: Burden of Proof.** In an action on an accident insurance policy which provides for the payment of a certain sum if insured die from bodily injury effected through external, violent and accidental means, the burden of proof is on the plaintiff to show that death resulted from such means alone. Ib.

3. **Death by Accident: Proximate Cause: Instructions.** In an action on an accident insurance policy, providing for the payment of a certain sum if insured die from bodily injury effected through external, violent and accidental means, where the question of whether insured died from an accident resulting from a fall, or from apoplexy, was in issue, the court instructed that, before the jury could find for plaintiff, they must find that the direct cause of insured's death was bodily injury effected through external, violent, and accidental means alone, independent of all other causes, and that his death did not happen directly or indirectly in consequence of disease, and was not caused wholly or in part by bodily infirmity or disease, and that there were external or visible evidence or marks of such accident on his body, and that insured accidentally slipped and fell from a stool, and that this was the direct cause of the bursting of a blood vessel, which resulted in his death. In another instruction, the court charged that, if insured fell and burst a blood vessel, then the fall was the direct cause of his death, not withstanding the jury might find that he was suffering from diseased arteries, heart, and kidneys. *Held*, that the instructions sufficiently charged that the accident must have been the direct cause of death, in order to authorize a recovery, especially in view of a further instruction that, if the fall was caused by apoplexy or a hemorrhage brought on by a diseased condition of the arteries, plaintiff could not recover. Ib.

4. **Same: "Visible Marks" on Body.** In an action on an accident insurance policy, providing that the insurance should not cover any death "of which there shall be no external or visible marks on the body," a recovery cannot be had unless there were such marks on the body of insured; but the issuance of blood from his ear and nostril after his death is a "visible mark," within the policy. Ib.

5. **Same: Diseased Condition of Insured: Contributory Cause of Death.** Where the death of insured proximately results from bodily injury effected through external, violent and accidental means, a recovery may be had under an accident insurance policy, providing for the payment of a certain sum if insured die from bodily injury effected through external, violent and accidental

Digitized by Google

ACCIDENT INSURANCE—Continued.

means, and providing that the insurance should not cover death directly or indirectly happening in consequence of disease, or caused wholly or in part by bodily infirmities or disease, although a diseased condition contributes to the death; the question determinative of the right of recovery being that of proximate cause—if the immediate cause of death is disease, there is no liability but if the immediate cause is an accident, there is. Goodes v. Order of U. C. T. of A., 330.

ACCOUNTS. See **Mechanics' Liens.**

1. **Special Contract.** In a suit for the balance due on an account for stone sold and delivered, where the suit is upon an account stated, the admission of the plaintiffs, that they agreed that if defendant would give his note for the balance, they would hold it as cash and credit it with any loss accruing to defendant from any defective material they had sold, does not destroy their right to recover as upon an account stated under the circumstances of this case. It is not shown that the stone was sold upon any such condition nor that an agreement as to the amount due was obtained by making any such agreement. And it does not appear that the condition upon which the specified contract was to rest was not complied with by appellant. Gilfillan et al. v. Welsh, 1.

2. **Proof: Value.** In an action on an itemized account if there is no proof of the value of the items the case must fail, even though it is shown the items were furnished. Porch v. Pollock, 427.

3. **Same: Conversion: Value.** Even if an action on an itemized account can be considered as a statement in conversion before a justice of the peace, there must be some evidence of the value of the thing converted. Ib.

4. **Counterclaim: Statute.** The plaintiff sued on an account in a justice court for stoves sold and delivered to defendant. The latter not only refused to pay, but filed a counterclaim for damages for breach of contract and warranty and loss of business. The cause was appealed to the circuit court and upon trial, the defendant was allowed, over the objection of the plaintiff, to amend his counterclaim by striking out the item of damages resulting from loss of business and by inserting a new demand for freight charges. *Held*, that a counterclaim may be amended in the circuit court, under Sec. 7586, R. S. 1909, but not so as to change the cause of action nor add a new cause to that originally pleaded. Excelsior etc. Co. v. Million, 718.

5. **Same: Breach of Warranty: Remedies.** Where the vendor has been guilty of a breach of warranty the vendee has two remedies: First, he may recover the difference in value between the chattel as warranted, and its actual value in its defective condition; or he may, within a reasonable time, reject and return the chattel to the vendor and maintain an action for the recovery of the full amount paid on the purchase price. Ib.

ADMINISTRATORS. See **Executors and Administrators.**

AGENCY.

Evidence: Declarations. One's declarations without more, that he is an agent for others is not competent against such others. But if the agency is established prima facie, by other testimony, then his declarations are admissible, and he is a competent witness in establishing a prima facie agency. Oil Well Supply Co. v. Metcalf et al., 555.

Digitized by Google

APPEAL AND ERROR. See **Mandamus: Pleading.**

Reversal and Remanding: Authority. When, on appeal, a judgment is reversed and the cause remanded with directions, the trial court has no authority to perform any other function than that directed, and it is improper for him to enter into an investigation of the matter litigated. State ex rel. v. Lamb, 360.

APPELLATE PRACTICE.

1. **Damages for Vexatious Appeal.** Where an insurance company, sued on an industrial life policy, did not put forward any defense on the merits, and, although no just or reasonable ground for appeal existed, nevertheless appealed from the judgment rendered against it, *held*, that ten per cent damages should be added to the amount of the judgment, for vexatious appeal, as authorized by Sec. 2084, R. S. 1909. Wallace v. Ins. Co., 110.

2. **Action for Maintenance: Conclusiveness of Finding.** In an action by a wife for maintenance, where the evidence is conflicting but is ample evidence to sustain the finding in favor of the wife, the judgment based thereon will not be disturbed on appeal. Bante v. Bante, 123.

3. **Crimes and Punishments: Duty of Court to Examine Record.** On appeal by the defendant from a judgment of conviction in a prosecution for a criminal offense, although neither appellant nor spondent files briefs, it is the statutory duty of the court to examine the record for error, under Sec. 5312, R. S. 1909. State v. Miles, Jr., 181.

4. **Attachment: Orders Before Final Judgment: Appealability.** An order revoking an order of sale of attached goods and setting aside a sale thereunder is not appealable, prior to final judgment; but such an order may be reviewed, on an appeal by plaintiff after final judgment, even though such judgment be in his favor. Mitchell v. Greely et al., 250.

5. **Disposal of Case: Theory in Trial Court.** A case will be disposed of, on appeal, on the same theory upon which it was tried by the trial court and the parties litigant. Camren et al. v. Squires, 272.

6. **Same: Conclusiveness of Findings: Equity Case.** Findings of fact by the trial court in an equity case, while persuasive, are not conclusive on the appellate court. Ib.

7. **Former Decision: Law of Case.** The opinion of an appellate court is the law of the case, and is not to be overturned unless under such circumstances and on such considerations as would compel the court to hold, on a subsequent appeal, that it was rendered under mistake of the law—and not always then. Hartung v. Ins. Co., 289.

8. **Rulings on Evidence: Review.** Where the record does not show the ground of objection to a leading question put to a witness on direct examination, the appellate court will assume that it was leveled against the form of the question and that the court sustained it on that ground. Esque v. Railways Co., 317.

9. **Erroneous Instructions: Presumptions.** The appellate court, on appeal from a judgment for plaintiff in an action for personal injuries, will presume that the jury followed the instruction on the measure of damages, authorizing an award for elements not warranted by the proof, and that they included an award for these improper elements in their verdict. Ib.

Digitized by Google

APPELLATE PRACTICE—Continued.

10. **Erroneous Instructions on Measure of Damages: Review.** To render an error in an instruction on the measure of damages. arising from the fact that it includes improper elements of damages, reviewable on appeal, it is not essential that the verdict be attacked in the motion for a new trial on the ground of excessiveness. Esque v. Railways Co., 317.

ASSUMPTION OF RISK. See **Master and Servant.**

ATTACHMENTS. See **Appellate Practice.**

1. **Setting Aside Order of Sale.** The trial court has authority to revoke an order of sale of attached goods and to set aside a sale thereunder, especially where the plaintiff is the purchaser and the rights of third persons have not intervened. Mitchell v. Greely, et al., 250.

2. **Same: Evidence: Suppression of Evidence.** Where the plaintiff in an attachment suit prevented an inspection of the property attached, he was in no position to urge, on appeal, that, because there was no definite evidence of the value of such property, the court was not authorized to revoke the order of sale of such property and set aside the sale thereunder on the ground that the property was sacrificed. Ib.

3. **Same: Sufficiency of Evidence.** Evidence adduced in support of a motion to revoke an order of sale of attached goods and to set aside the sale thereunder, relating to the conduct of the sale by the sheriff and the failure to give sufficient notice thereof, *held* to show such an abuse of the process of the court as to warrant the sustaining of the motion. Ib.

ATTORNEY AND CLIENT. See **Witnesses.**

BANKRUPTCY.

1. **Preferred Creditors: Voidable Preference.** In order for the trustee of a bankrupt to recover the amount of a voidable preference of creditors four elemental facts must combine. First, the insolvency of the debtor at the time of the preference; second, the giving of the preference within four months of the petition in bankruptcy; third, the effect of securing to the favored creditor a greater percentage of his debt than other creditors of the same class may obtain from the estate of the debtor; and fourth, that the preferred creditor, when he received the preference knew or had reasonable cause to believe that it was the purpose of his debtor to give him a preference over the creditors of the same class. Newman v. Dry Goods Co., 528.

2. **Same: Natural Presumptions.** When a debtor pays and a creditor received the amount of a just debt, the natural presumptions are in favor of the good faith of the trannsaction. Merchants and other business men constantly continue to make payments up to the very eve of failure, and it would be disastrous to have them set aside on slight proof or mere suspicion. Ib.

3. **Same: Knowledge of Creditor.** The creditor is not to be charged with knowledge of his debtor's financial condition from mere suspicion in his mind of possible insolvency, nor is it essential that the creditor should have actual knowledge of or believe in his debtor's insolvency, but he should have reasonable cause to believe his debtor to be insolvent. If facts and circumstances, with respect to the debtor's financial condition, are brought home to him, such as would put an ordinary prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose. Ib.

Digitized by Google

BENEFICIARIES. See Life Insurance.

BILLS AND NOTES.

1. **Fraud: Evidence to Support.** In a suit on the alleged guaranty of a note, the defendant attempted to set up fraud in obtaining the execution of the guaranty. There was no evidence of a trick, artifice or deception practiced on him at the time. Prior to this he had signed a contract agreeing to guarantee the particular note in question. There was no proof that this contract was obtained by fraud. In the absence of fraud in this first contract, the statement of the agent to defendant, "Here are your notes," meaning the two notes he was to guarantee, and at the same time laying them face downward on the table, was not a fraudulent representation by conduct, and even if defendant could not, by reason of the absence of his spectacles, have seen the date when said note fell due, had he turned the note over, yet, as he said nothing about not being able to read without his spectacles, and did not ask what note he was guaranteeing, nor do anything to ascertain what note it was, but hurriedly wrote his name across the back and went on out of the room, there was no showing of fraud, and such defense must fail. Avery Co. v. Powell, 628.

2. **Same: Negligence.** In the absence of any misrepresentation calculated or likely to mislead, negligence in signing an instument without knowing or making any effort to know the contents thereof will prevent one from avoiding the contract even though it turns out not to be what he supposed it was. If no fraud is practiced to induce him to refrain from reading it or having it read, his ignorance of the contents is not due to fraud but to his own negligence. Ib.

3. **Same: Evidence: Burden of Proof.** Fraud is never presumed. The burden of proving fraud rests on him who asserts it. And while fraud may be inferred when it is a legitimate deduction from all the facts in evidence, yet when a transaction under consideration may as well consist with honest and fair dealing as with a fraudulent purpose, it is to be referred to the better motive. Ib.

4. **Payment: Burden.** On a plea of payment, the notes being admitted, the burden is on the defendant to sustain his plea. Winfrey v. Matthews, 713.

BROKERS. See Real Estate Brokers.

CARRIERS OF GOODS. See Common Carriers.

1. **Burden of Proof.** A railway carrier of grain who receives it for shipment is obliged to deliver it at destination; and if it be lost or injured the burden is on him to excuse himself by showing that it occurred in some way for which he is not liable. The presumption is in favor of the shipper and a receipt and failure to deliver in as good condition as received, makes a prima facie case for him. Yontz v. Railroad, 482.

2. **Same: Pleading: Specific Negligence: Onus: Presumption.** If the petition, of a shipper in an action for damages to corn on its arrival at destination, alleges the specific negligence which caused the damage, the burden is on him to prove the damages alleged since, as he knows the cause, no presumption arises in his favor. Presumptions do not exist where the facts to be presumed are shown. Ib.

Digitized by Google

CARRIERS OF LIVE STOCK.

1. **Damages: Delayed Shipment: Federal Law.** The plaintiff sued to recover damages for a delayed shipment of cattle over the defendant's railroad. The cattle were received at Stewartsville to be shipped to Chicago. The defendants unloaded the cattle at Galesburg in order to feed and water them, as they were compelled to do under the Federal "twenty-eight hour" law, unless the shipper otherwise specified in writing, which he did not do. *Held*, that the delay was caused by the action of plaintiff in electing to have the cattle unloaded at Galesburg, and not by any negligence of the defendant. Hickey v. Railroad, 408.

2. **Same: United States Statute.** The U. S. Comp. Stat., pp. 1178-79, provides that no railroad shall confine live stock in cars for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water and feeding for a period of at least five consecutive hours, provided that upon the written request of the owner, which written request shall be separate and apart from a printed bill of lading or other railroad form, the time of confinement may be extended to thirty-six hours. Ib.

3. **Same: Burden of Proof.** In order to recover the damages sustained in consequence of delay in the transportation of a shipment the burden is on the plaintiff to show not only an unusual delay but that such delay was caused by negligence of defendant. Negligence is the gravamen of the action and the rule is well settled that mere proof of delay, of itself, will not support an inference of negligence. Ib.

4. **Damages: Delayed Shipment.** The plaintiff sued to recover damages from the defendant for a delayed shipment of fat cattle from Rosendale to Chicago. The cattle were unloaded, fed and watered at Galesburg, and were delayed at Mendota on account of a wreck, finally arriving in Chicago too late for that day's market. *Held*, that the unusual delay in transportation was not caused by the defendant's negligence. Gregory v. Railroad, 550.

5. **Same: Inference of Negligence.** The mere proof of an unusual delay in the transportation of property by a common carrier will not support an inference that such delay was due to the negligence of the carrier, but that since the means of showing how such delay occurred is with the carrier and not the shipper, it would be "enough for the plaintiff to disclose circumstances sufficient to raise a fair inference of negligence." Ib.

6. **Same: Evidence.** In order to raise an inference of negligence there must be some evidence of negligence and that the burden of proving that fact is on the plaintiff who asserts a right to receive damages on the ground that he was damaged by such negligence. Ib.

7. **Same: Negligence: Damages.** A carrier is not liable in an action for damages for accidental or unavoidable delays but only for those caused by its negligence. Ib.

CARRIERS OF PASSENGERS.

Personal Injuries: Pleading: Evidence. Plaintiff charged that defendant was negligent in failing to latch and securely fasten a door at the exit of its street car platform, on which door was a rod or handhold for use in boarding or alighting from the car. There was evidence that plaintiff was standing on the platform at the

Digitized by Google

CARRIERS OF PASSENGERS—Continued.

exit ready to alight when the car would come to a stand still; that he had hold of the rod on the door and that the door came unfastened and swung outward throwing him to the street. *Held*, that the fact that the door with its handhold did come loose was some evidence of negligence, and that the case was properly one for the jury. Adams v. Railway, 5.

COMMON CARRIERS. See Carriers of Goods.

1. **Interstate Commerce: Supremacy of Federal Laws.** The extent of a carrier's liability for loss of an interstate shipment of goods is governed by the Interstate Commerce Act of February 4, 1887, 24 Stat. at Large, 379 (U. S. Comp. St. 1901, p. 3154), and its amendments, including that of June 29, 1906, 34 Stat. at Large, 584 (U. S. Comp. St. Supp. 1911, p. 1284), and the decisions of the United States Supreme Court construing these acts, which supersede all state regulations and rules of decision on the subject. American etc. Mfg. Co. v. Railroad, 184.

2. **Interstate Commerce: Limitation of Carrier's Liability.** Where a common carrier publishes and files, in accordance with the Interstate Commerce Act, two rates on interstate shipments, under the lower of which the carrier's liability for loss is limited to ten times the freight paid, and under the higher of which the carrier's liability is unlimited, a shipper whose goods are shipped under the lower rate may recover, in the event of loss, only in accordance with the limitation annexed to such rate; such limitation being valid under the Interstate Commerce Act and its amendments as construed by the Supreme Court of the United States. Ib.

3. **Same:** Where the bill of lading issued by a carrier for an interstate shipment provided that the amount of any loss should be computed on a basis of the value of the property at the time of shipment, unless a lower value was represented in writing by the shipper, or had been agreed on, or was determined by the classifications or tariffs on which the rate was based, in any of which events the lower value should be the maximum amount to govern such computation, and the shipment was made under a rate, published and filed in accordance with the Interstate Commerce Act, and which limited the carrier's liability, in case of loss, to ten times the freight paid, the shipper, in an action on the contract for loss of the shipment, was bound by the contract as written, and a recovery could be had only in the amount of ten times the freight paid, notwithstanding the fact that the shipper disclosed to the carrier's agent that the value of the goods was several thousand dollars, and the carrier, and not the shipper, selected the rate charged, when another and higher rate was in force, under which the carrier would have assumed full liability for loss. Ib.

CONTEMPT.

Corporations: Punishment: Contumacious corporations are not reached by attachment and fine of their officers (unless they are personally in contempt), but by distringas or writ of sequestration. In re Koehler, 297.

CONTRACTS. See Accounts.

1. **Written Contract: Prior Negotiations.** All prior negotiations and conversations antecedent to the execution of a contract are deemed to have been merged in it, and, in an action on it, the recovery must be in accordance with its terms, in so far as they are valid. American, etc. Mfg. Co. v. Railroad, 184.

Digitized by Google

CONTRACTS—Continued.

2. **Forfeitures.** Although forfeitures are not favored, yet when a contract is a lawful one, is fairly made, and provides for a forfeiture, a forfeiture will be enforced. Day et al. v. Woodmen Circle, 260.

3. **Pleading: Modification.** In an action on a contract which has been modified, the petition should declare on the contract as modified. Whitelock et al. v. Beach, 428.

4. **Same: Variance.** Where a petition declares on a certain specific contract and the evidence shows another substantially different agreement, there is a fatal variance. Ib.

5. **Same: New Matter: Plaintiff's Showing: Avoidance.** Where the contract in suit once existed, but has been avoided by matter subsequently arising, this is new matter and must be pleaded by the defendant. But though the contract once existed, if it shows on its face that it has been avoided, as, for instance, if the time for its performance has expired, or if the plaintiff himself shows by evidence that it has been avoided, his case fails and there is no necessity for defendant pleading the avoidance. Ib.

6. **Usury: Law Governing.** The place of performance of a contract, in the absence of an attempt to evade the laws, furnishes the law governing its terms. So, where a chattel mortgage and notes secured thereby were payable in Missouri, were sent to Missouri for collection, and the only one paid was paid in Missouri, they will be considered Missouri contracts, although signed in Kansas, and the Missouri laws against usury will be applicable thereto. Especially is this true where the notes and mortgage were executed pursuant to a contract made in Missouri for the purchase of a machine delivered, located, and used in Missouri, and there is nothing to show that the parties had any thought of contracting with reference to the laws of any other state. Machine Co. v. Tomlin, 512.

7. **Same: Intent of Parties.** When there is nothing in the contract saying specifically what state shall govern the contract, it may be inferred from all the terms of the contract taken in connection with all the circumstances surrounding the transactions. While the residence of a party to a contract is, or may be, a significant fact, in determining what law the parties had in view, yet it is only a fact to be considered with other facts bearing on that question. Ib.

8. **Same: Jury Question: Directed Verdict.** Although the question as to what law should govern a contract may sometimes depend upon the intent of the parties, yet this does not require the submission of the question to a jury where all the facts are admitted, and but one inference can be drawn from them. Ib.

9. **Same: Notes Bearing Unlawful Rate After Maturity.** Our statutes forbid the taking of more than eight per cent per annum as interest. And, as such statutes make interest include any sum taken, directly or indirectly, for "forbearance" as well as for the "use" of money, a note bearing a lawful rate before maturity and an unlawful rate after that time, becomes usurious if forbearance is exercised and the unlawful rate is charged or exacted. If the sum charged or exacted for the use of money loaned exceed the legal interest, it is usury no matter what words it may be clothed in. Ib.

CONTRIBUTORY NEGLIGENCE. **See Evidence; Master and Servant; Negligence.**

Digitized by Google

CONVERSION. See Accounts.

CORPORATIONS. See Contempt; Executions.

COUNTER-CLAIM. See Accounts.

CRIMES AND PUNISHMENTS. See Appellate Practice.

Alibi: Instructions. An instruction, covering the defense of alibi, in a criminal prosecution, that if the evidence left a reasonable doubt as to defendant's presence at the place where the offense was committed at the time of its commission, he could not be convicted, for the presumption of innocence attends him throughout the trial and he can only be convicted on the establishment of guilt beyond a reasonable doubt, was correct. State v. Miles, Jr., 181.

CRIMINAL LAW. See Injunction.

DAMAGES. See Appellate Practice; Carriers of Live Stock; Fire Insurance; Instructions; Master and Servant; Negligence; Railroads; Telegraph and Telephones.

1. **Verdict of Jury: Excessive Award.** Plaintiff's injury was not permanent. It caused him some pain and discomfort. He alleged in his petition that he lost wages of fifteen dollars per week since his injury and incurred an indebtness of $100 for medical attention. But no proof of either was offered and he said he worked at his job but had to hire some of his duties performed by another. He was porter at a club. No instruction as to damages was given by him and the jury had no guide to assist them in assessing the damages. *Held*, that $2000 was excessive and that $500 should be remitted as $1500 would be a most liberal allowance. Adams v. Railway, 5.

2. **Penal and Remedial Statute: Strict Construction.** As section 5425, R. S. 1909, stood prior to the amendment of 1905, the penalty feature inhered in and existed throughout the whole of the sum allowed. It was fixed at $5000, and no more, no less, and if penal at all, was penal throughout, that is, its penalty existed throughout along with its remediality. Hence, under that statute if plaintiff would seek a penalty, he must ask for the precise sum named in the statute, and if his petition asked for a less amount, it did not come within the statute and, therefore, stated no cause of action thereunder. Such statute must be strictly construed. Johnson v. Railroad, 16.

3. **Same: Amendment of 1905.** It would seem that if the language of the statute as amended in 1905 is accepted as it reads, then the element of penalty exists throughout the whole of the amount now specified the same as before the amendment. And if such is the construction to be placed on the statute as it now stands, then a petition which does not sue for the whole amount allowed by the statute, states no cause of action. To allow a plaintiff to sue for less than the whole penalty provided would enable plaintiffs to whittle down the state's penalties to suit their convenience thereby making different penalties in different suits for the same character of acts. Ib.

4. **Same.** If, however, the statute, as it now stands, is penal only as to the $2000 minimum and compensatory as to anything in excess of that sum, then a plaintiff can either sue for the penalty alone, or for penalty with compensation. And, construing the case of Boyd v. Railway, 155 S. W. 13 as holding that the statute is penal only as to the $2000, it is held that a plaintiff can sue for the penalty only and therefore a petition asking for $2000, and

Digitized by Google

DAMAGES—Continued.

making no claim for compensation, is not demurrable. In as much as this holding involves the proper construction to be placed on the case of Boyd v. Railroad, supra thereby bringing into the case the question of the constitutionality of the statute as thus construed, this case is certified to the Supreme Court. Johnson v. Railroad, 16.

5. **Destruction of Growing Crops: Measure of Damages: Instructions.** The measure of damages for the destruction of growing crops is the value of the crops destroyed, standing in the field at the time they were destroyed, and, therefore, it is error, in such an action, to permit a recovery for the market value of the crops in their matured state and after being garnered on the premises of the plaintiff. Pace et al. v. Railroad, 227.

6. **Same: Evidence.** In an action for damages for the destruction of growing crops, evidence of previous yields upon the same or similar land, together with the cost of production and of the market price, is competent on the measure of damages. Ib.

7. **Personal Injuries: Instructions: Failure to Limit Recovery.** In an action for personal injuries, it is not reversible error for the instruction on the measure of damages to fail to limit the recovery on the different items of damages to the full amount demanded therefor in the petition. Erdmann v. Railway, 245.

8. **Action for Personal Injuries: Evidence.** Where, in an action personal injuries, plaintiff's condition and the extent of her injuries were fully proved by the evidence of herself and her physicians, whether she knew the extent of her injuries when she brought the action, or was acting on her own knowledge or on information given by her physicians when she consulted counsel, was immaterial. Ib.

9. **Husband and Wife: Recovery by Husband for Injury to Wife: Loss of Wages and Profits.** A husband is entitled to recover for his loss of wages or earnings or profits in his business which he has sustained in consequence of waiting upon his wife, negligently injured; but it is essential to a recovery that he show evidence by the amount of wages, value of time, or the amount of profits, lost. Esque v. Railway, 317.

10. **Same: Loss of Time: Necessity of Proving Value: Instructions.** In an action by a husband for damages sustained by reason of the injury of his wife, evidence that he did work about the house and was up at night and that it would have cost a certain amount to have employed a servant, had no tendency to prove the value of his time while caring for his wife, and there being no other evidence bearing on this question, an instruction, authorizing a recovery for time plaintiff was compelled to spend in caring for his wife, was erroneous, as not supported by evidence. Ib.

11. **Same.** In an action by a husband for damages sustained by reason of the injury of his wife, where plaintiff did not prove the value of his time while caring for his wife, an erroneous instruction, allowing a recovery for loss of time, could not be held nonprejudicial on the theory that the jury merely awarded nominal damages on this item, since the appellate court cannot say that the jury disregarded the instructions or that it failed to influence them as to the amount of their verdict. Ib.

12. **Railroads: House Tracks: Obstructions in Public Streets: Abutting Property Owner.** The plaintiff sued to recover damages for the erection and maintenance of a house track by the defendant

Digitized by Google

DAMAGES—Continued.

on a public street adjoining her property. The municipality, by ordinance, allowed such use of the street but required the railroad company to pave it. *Held*, that plaintiff was entitled to recover, first, for the impairment of the means of ingress and egress; second, for the injury to the comfortable use and enjoyment of the premises; and third, for the destruction of her right to use the street as a temporary place of deposit for fuel and other bulky materials for use and consumption on her premises. Wright v. Railroad, 446.

13. **Same: Grants in Public Streets: Statutes.** A railroad company has the right to lay down and use its tracks upon a street when that right is conferred upon it by the municipality, the municipality having the power delegated to it to grant that right. But the power of the municipal authorities to grant to a railroad company the right to lay its tracks along a street is not absolute. They cannot do so if the operation of the railroad will destroy the use of the street as a public thoroughfare. Ib.

14. **Same: Unlawful and Unreasonable Obstruction.** Where the railroad track constitutes an unreasonable or unlawful obstruction in the street, the abutting property owner may recover, from the person causing such obstruction, damages for the injury he sustains where such damages are particular, direct and special. Ib.

15. **Pollution of Watercourses.** The plaintiffs sued to recover damages for the pollution by the defendant of a natural watercourse that ran over their land. The defendant operated a meat packing plant and emptied into the stream highly offensive and deleterious fluids and substances which caused the stream and an adjacent well to become unfit for use. *Held*, that the plaintiffs were entitled to damages resulting from loss to the rental value of their property to the date of the filing of the suit and from the permanent injury to the well which their evidence tends to show has been completely destroyed by the seepage from the polluted stream. Hanlin v. Burk Bros., etc., Co., 462.

16. **Permanent and Temporary Nuisance.** When a dominant proprietor has set up a nuisance to the injury of his servient neighbor, that may be abated or discontinued at any time, it is a temporary injury and not permanent. Ib.

17. **Railroads: Public Road Crossings.** This is an action instituted by the plaintiff to recover damages to his horse and buggy by a collision with the defendant's railroad train. A servant of the plaintiff and two companions were driving plaintiff's horse and buggy home from the county fair, when they fell asleep, and, while still asleep, the horse approached the defendant's railroad crossing near a station called Steinmetz. The defendant's freight train, cut in two to leave the crossing open, was standing there, and, as a passenger train approached, the crew closed up the gap, preparing to follow the passenger train. The horse went on the track in the path of the coming passenger train, was killed and the buggy wrecked. *Held*, that there was no prejudicial error to the plaintiff at the trial. Fife v. Railroad, 655.

18. **Railroads: Fences.** When a railroad company negligently fails to maintain the kind of enclosure required by law, and, as a consequence of such negligence, an animal strays upon the track and is injured the owner may recover damages thus inflicted upon him, though the manner of the injury may be outside the purview of the statutory remedies. McCaskey v. Railroad, 724.

Digitized by Google

DAMAGES—Continued.

19. **Statute.** The remedy provided in Sec. 3145, R. S. 1909, is not available to one whose horse was not injured by a locomotive or train, nor could he maintain an action under the succeeding section since his horse was not frightened or run by a passing locomotive or train. McCaskey v. Railroad, 724.

DEEDS OF TRUST. See **Statute of Frauds.**

DEFINITIONS.

1. **"Widow."** The word "widow" signifies a woman who has lost her husband by death and is not married again. In re Ryan, 202.

2. **Insolvency.** By insolvency, with reference to a person, is meant not one who "was unable to pay his debts as they become due in the ordinary course of his daily transactions" but one whose property "shall not at a fair valuation, be sufficient in amount to pay his debts." Newman v. Dry Goods Co., 528.

3. **Reasonable Worth or Value.** "Reasonable worth" or "reasonable value" are terms which have a definite and common meaning to people of ordinary information and understanding, and their use in instructions relating to the issue of the market value of property should not be condemned as reversible error. Globe & Rutgers Ins. Co. v. Railroad, 542.

DIVORCE. See **Husband and Wife; Parent and Child.**

1. **Indignities: Evidence.** Evidence of the wife's conduct in receiving the visits of men in the absence of her husband, and corresponding with men, though falling short of proof of adultery, will sustain a charge of indignities and entitle the husband to a divorce. Rea v. Rea, 715.

2. **Same: Adultery: Indignities: Amendment: Evidence.** Where a petition for divorce contained a charge of adultery and of indignities, the trial court may properly permit an amendment after the evidence is heard striking out the adultery charge and making more specific the charge of indignities so as to conform to the proof. And in such case, it is not error to refuse to permit defendant to introduce further evidence. Ib.

3. **Same: Amendment: Reverification.** In a divorce proceeding where an amended petition is filed not setting up new causes, but merely amplifying those already alleged, it need not be reverified by affidavit. Ib.

4. **Alimony Pendente Lite.** The right of a wife to alimony *pendente lite* and suit money is not absolute and will be denied in instances where she had sufficient property in her own right to prosecute or defend the action. But the law still recognizes the right of a wife to receive support from her husband pending the divorce suit where her own means are inadequate to support her in a manner suitable to the means of her husband. It is largely in the discretion of the court whether to allow alimony *pendente lite* in any given case. Davis v. Davis, 538.

DRAM SHOPS.

1. **Granting License: Judicial Act.** The power or jurisdiction to grant saloon licenses is vested exclusively in the county court, and, in passing upon an application for a saloon license, the court acts judicially. State ex rel. v. Thornhill, 409.

Digitized by Google

DRAM SHOPS—Continued.

2. **Same: Two-thirds Petition.** The matter of hearing and passing upon an application for a saloon license is judicial whether the applicant claims to have a majority or a two-thirds majority of the persons in the block qualified to sign. Whether an act is ministerial or judicial depends upon the nature and character of the act and the things necessarily involved therein and not upon the allegation in appellant's petition. Ib.

3. **Same: Mandamus: To Compel Granting of License.** Where the record shows that the county court entertained relator's petition for a license, and after listening to the evidence, found that relator's petition did not contain a two-thirds majority of the required signers, and, on this account, refused to grant the license, mandamus will not lie. And where the petition for the writ and the alternative writ show on their faces the existence of such finding by the county court adverse to relator, they state no cause of action. Ib.

4. **Same: Decision of Preliminary Question.** Even upon the theory that such finding is upon a preliminary matter to be determined before the right to act arises, the decision of the county court on such preliminary question of fact, which involves the hearing of evidence and the formation of belief in regard thereto and the reaching of a conclusion thereon both as to fact and law, can not be reviewed by mandamus because the general nature of the duty to be performed is judicial, and the law intends that such decision shall be final. Ib.

5. **Same: When Mandamus Will Lie.** It is only when the county court refuses to hear the application, or when it has found in relator's favor every fact necessary to the granting of the license, and yet refuses to issue the license, that mandamus will lie. Ib.

EQUITY. See **Judgments; Trial Practice.**

EVIDENCE. See **Accident Insurance; Agency; Attachments; Bills and Notes; Carriers of Live Stock; Carriers of Passengers; Damages; Fire Insurance; Fraud and Deceit; Life Insurance; Maintenance; Master and Servant, Negligence; New Trial; Partnership; Trial Practice.**

1. **Contributory Negligence: Illumination.** It is not error to admit evidence tending to show that there was bad air in the mine which greatly diminished the illuminating power of the lights carried by the miners and those maintained in the mine by defendant, when such evidence has a direct bearing on the issue of contributory negligence. Martin v. Coal Co., 441.

2. **Same: Relevant and Material: Admissibility.** Evidence that is competent, relevant and material on a contested issue is always admissible whether or not it would tend to support a different cause from that pleaded in the petition. The proper practice is to admit the evidence and by instruction restrict its scope to the issues made by the pleadings. Ib.

3. **Opposed to Physical Facts: Conclusiveness.** A witness' testimony is not conclusive, although no witness testifies to a contrary state of facts, especially where the physical facts tend to contradict it. Chappell v. Railway, 126.

4. **Expert Evidence: Invading Province of Jury.** In an action on an accident insurance policy, where the question of the cause of insured's death is in issue, one of the functions of an expert witness

Digitized by Google

EVIDENCE—Continued.

is to give his opinion of the cause of death, basing it on the hypothetical case; and such an opinion is not objectionable as usurping the province of the jury. Goodes v. Order of U. C. T. of A., 330.

5. **Same.** In an action on an accident insurance policy, where the question of whether insured died from an accident resulting from a fall, or from apoplexy, was in issue, plaintiff's counsel propounded a hypothetical question to a physician, which, after hypothesizing that insured sustained a fall and other facts connected with the death, concluded with a request that the witness give his opinion of the cause of death. The witness answered that the death was the result of a concussion and compression of the brain, brought from a hemorrhage proceeding from a fracture at the base of the skull, which fracture was caused, in the hypothetical case stated, by the fall. *Held*, that neither the question nor the answer was improper as seeking to substitute the witnesses' opinion for the verdict of the jury. Ib.

6. **Presumptions: Inferences.** It is not permissible, in a court of law, to base presumptions upon presumptions and inferences upon inferences; but it is the province of the jury to draw all proper inferences which the facts in evidence warrant. Ib.

EXECUTIONS.

1. **Examination of Judgment Debtor: Corporations: Officers.** Sec. 2248, R. S. 1909, providing that, when an execution against the property of a judgment debtor is returned unsatisfied, the judgment creditor may obtain an order for the examination of the judgment debtor, does not include persons not parties to the cause, and hence does not include the officers of a corporation judgment debtor. In re Koehler, 297.

2. **Examination of Judgment Debtor: Construction of Statutes.** Sec. 2248, R. S. 1909, providing that, when an execution against the property of a judgment debtor is returned unsatisfied, the judgment creditor may obtain an order for the examination of the judgment debtor, and the following kindred sections, are highly penal, and hence they must be construed strictly, both as to the cases embraced within their terms and as to the methods to be pursued. Ib.

3. **Examination of Judgment Debtor: Other Witnesses.** Sec. 2248 R. S. 1909, et seq., providing for the examination of a judgment debtor after an execution has been returned unsatisfied, are not intended to furnish a means for procuring evidence from witnesses generally, but their sole purpose is to secure testimony from the execution defendant, and no other witness is to be examined. Ib.

4. **Same: Prerequisites.** It is a condition precedent to the making of an order for the examination of a judgment debtor, after return of an execution unsatisfied, that the court find, as required by Sec. 2249, R. S. 1909, that there is reasonable ground to believe that the judgment debtor has property subject to execution, or has conveyed or attempted to convey it with a design to defraud creditors. Ib.

5. **Same: Affidavit for Order: Sufficiency.** An affidavit in support of an order for the examination of a corporation judgment debtor and its officers, after return of the execution unsatisfied, under Sec. 2248, R. S. 1909 et seq., which avers that the affiant is informed and believes that defendant has property subject to execution, but does not aver that it has conveyed or attempted to convey its property to defraud its creditors, and which avers that

Digitized by Google

EXECUTIONS—Continued.

the property subject to execution and which it has concealed, consists of unpaid liability of stockholders, and that the officers are familiar with the facts concerning the identity of the stockholders and their residence and the extent of their liability, and that the officers are to be examined as to all other facts concerning the assets of the corporation, is insufficient to justify an order, since the only asset it shows the execution debtor possessed was unpaid stock subscriptions and the names of the delinquent stockholders are to be ascertained, and their liability enforced, in a different character of proceeding. Ib.

EXECUTORS AND ADMINISTRATORS.

1. **Allowance to Minor Children.** Under Sec. 119, R. S. 1909, providing that, when a widow dies leaving minor children under sixteen years of age, they shall be entitled to the same allowances that she was entitled to take at the death of her husband, such children are entitled to those rights in the estate of the deceased mother, without regard to her interest in the estate of her deceased husband. In re Ryan, 202.

2. **Same: "Widow".** Sec. 119, R. S. 1909, and kindred statutes, entitling minor children to certain allowances out of the estate of their deceased father or mother, although not in entire consonance with the common law, are highly remedial in character and are to be construed so as to carry out the spirit and purpose intended by the Legislature, and it is the duty of the court, as the case may require, to enlarge or restrain the meaning of words therein employed, to the end of effectuating the legislative intent; and, therefore, section 119, providing that, in case a widow shall die, leaving minor children under sixteen years of age, they shall be entitled to the same allowances she was entitled to take at the death of her husband, should, in view of the evident legislative intent to provide a sure support for the minor children, be construed to give a minor child under sixteen years of age, whose parents had been divorced, a right to an allowance out of the estate of its deceased mother, although its father was living and the deceased mother, therefore, was not a "widow." Ib.

3. **Guardians and Curators: Jurisdiction: Foreign Decedent or Ward: Insurance.** The probate court of the domicile of a person whose life was insured had authority to appoint an administrator of the estate of a deceased grandchild and a curator for an infant grandchild of insured, beneficiaries under the policy, notwithstanding both grandchildren were nonresidents of this state, and such administrator and curator had the right to maintain suit against the insurer on the policy. Hartung v. Ins. Co., 289.

4. **Guardian: Distribution: Pleading: Directions: Mandate.** The executor of an estate paid several legacies directed by the testator, and distributed $5000 to each of the residuary legatees, children of the testator, except a minor child. Her guardian filed a petition in the probate court settling up those payments; and settlements of the executor showing large cash balances in the hands of the executor; and that his ward was the only child and heir of one of the residuary legatees, and that he had died a few weeks before his father, the testator; and that the child took from her grandfather, a share equal to the shares of the other residuary legatees. The executor filed an answer to this petition, in which he did not deny any of the allegations therein, and set up as the sole reason why the child was not entitled to a distributive share that her father was indebted to her grandfather, the testator, in the sum larger

Digitized by Google

EXECUTORS AND ADMINISTRATORS—Continued.

than her distributive share would have been, and her taking from her grandfather was through her father and subject to the latter's debt to her grandfather. The probate court and the circuit court, on appeal, adopted that view; but on appeal to the Court of Appeals, the judgment of the circuit court was reversed and the cause remanded "with directions to find for the plaintiff the sum shown to be due." It was *held* that such directions required the circuit court to enter judgment for $5000 and interest, as being the sum shown by the record to be due; and that an inquiry by such court, or the probate court, was not proper. State ex rel. v. Lamb, 360.

5. **Settlements: Distributees: Payments.** Where an executor by his several settlements showed a large cash balance in favor of the estate and showed that he had paid all residuary legatees but one, $5000 cash, as a first distribution, he will not be allowed to defeat a judgment and order that he pay that one her distributive share, by showing that such settlements were false in that he had paid the other distributees' shares by conveying land to the distributees, and that he had no cash as reported in his settlements. Ib.

6. **Estates: Claim for Services.** The plaintiffs instituted this suit to recover from the executor, compensation for services rendered to the deceased, during his life time. The deceased lived at the home of plaintiffs, one of whom was a daughter, during the latter period of his life with the understanding that he would compensate them therefor. *Held*, that a plaintiff must recover, if at all, upon a contract either express or implied and in the absence of a showing of the existence of a mutual intention or understanding, that the services were not to be gratuitous, there can be no recovery. Burt et al. v. Gabbert, 521.

7. **Same: Joinder of Parties.** Where a husband and wife rendered services to the parent of the latter, under an implied agreement that the services were not to be gratuitous, they might join in an action to enforce such a contract. Ib.

8. **Claim for Personal Services.** The plaintiff sued the administrator of her deceased mother to recover compensation for personal services rendered during the latter part of her mother's life. The mother repeatedly stated that she wanted the plaintiff paid well for taking care of her and that she wanted her sister and aunt to have what was left. *Held*, that plaintiff failed to sustain her burden of proof and that the demurrer to the evidence should have been sustained. Crowley v. Dagley, 561.

9. **Same: Presumption.** Where personal services are rendered to an aged and partially helpless person by an adult child, the ordinary presumption that such services are to be paid for, which would arise were they performed by a stranger, does not obtain and the opposite presumption must be indulged that although the child was not legally bound to serve the parent gratuitously, the impelling motive was filial love or the dictates of humanity, rather than the expectation of pecuniary reward. Ib.

FOOD.

1. **Sale of "Imitation Butter": Sufficiency of Information: Statute Construed.** Art. 4 of Chap. 4, R. S. 1909, establishes a bureau of dairying and relates to dairy products and imitations. Section 650 defines "imitation butter," "for the purposes of Sec. 650 to 662," to include every article, substitute or compound, other than

Digitized by Google

FOOD—Continued.

that produced from pure milk or cream from the same, made in the semblance of butter and designed to be used as a substitute therefor. Section 657, which purports to prohibit "offering imitation butter for sale," provides that no person shall sell or offer for sale any substance designed to be used as a substitute for butter under the name of or under the pretense that the same is butter, *Held*, that sections 650 and 657 must be read together, evidencing a legislative intent to prohibit, by the latter section, the sale of "imitation butter," as defined by the former; and hence an information, charging that defendant sold and offered for sale a substance designed to be used as a substitute for butter, to wit, oleomargerine, under the name of and under the pretense that the same was butter, was fatally defective for failure to charge that the substance sold was made in the semblance of butter or in imitation thereof—the averment that accused sold oleomargerine not being tantamount to a charge that he sold "imitation butter," as defined, by the statute. [REYNOLDS, P. J., dissents.] State v. Shortell, 153.

2. **Same: "Oleomargerine."** Oleomargerine cannot be held as a matter of law to be imitation butter or an article made in the semblance of butter. Ib.

3. **Sale of Imitation Butter: Sufficiency of Information.** An information charging that defendant unlawfully sold and offered for sale a substance designed to be used as a substitute for butter, to-wit, oleomargerine, was fatally defective for failure to charge that the substance was "imitation butter or made in the semblance of butter;" following State v. Shortell, ante. *Held*, by REYNOLDS, P. J., dissenting, that inasmuch as oleomargerine is an article "other than that produced from pure milk or cream from the same, made in semblance of butter and designed to be used as a substitute for butter made from pure milk or cream from the same," it is "imitation butter," under Sec. 650, R. S. 1909, and hence the charge in the information that oleomargerine was sold "under the name and under the pretense that the same was butter," was sufficient to bring the offense within the statute. State v. Maurer, 162.

4. **Sale of Imitation Butter: Sufficiency of Information.** An information charging that defendant unlawfully sold and offered for sale a substance designed to be used, as a substitute for butter, to-wit, oleomargerine, was fatally defective for failure to charge that the substance was "imitation butter or made in the semblance of butter;" following State v. Shortell, ante. [REYNOLDS, P. J., dissents.] State v. Surkamp, 174.

FIRE INSURANCE.

1. **Vacancy: Waiver.** Where a suit is based on a policy having a clause rendering the policy void if the house becomes vacant without the consent of the company, and the defense is that the house was vacant at the time of the fire, but the plaintiff's claim is that the vacancy clause was waived, that the claim is established if it is shown that when the house became vacant the company was notified thereof and it failed to either cancel the policy and return the unearned premium or to show its consent by attaching to the policy a vacancy permit. Patterson v. Ins. Co., 37.

2. **Same: Amount of Recovery.** If, in such case, the company was notified of the vacancy before the fire, and it failed to attach a vacancy permit but waived the vacancy provision in the policy,

Digitized by Google

FIRE INSURANCE—Continued.

then the amount of recovery is determined by the policy, and not by the terms of the vacancy permit, since the latter never came into existence, and the suit is on the policy with the vacancy clause eliminated. Patterson v. Ins. Co., 37.

3. **Same: Vexatious Refusal to Pay: Penalty.** Where there were enough contradictions in plaintiff's statements to the company to cause a reasonable man to doubt his claim that he had, prior to the fire, notified the company's agent of the vacancy which fact was absolutely essential to his recovery, the company had a right to litigate the question whether he had or not, and should not be penalized for so doing. Ib.

4. **Same: Sufficiency of Evidence: Jury Question.** Whether plaintiff's evidence that he notified the company's agent of the vacancy before the fire is contradicted by his admitted correspondence showing that he did not know of the vacancy until the fire, involves in the last analysis a weighing of the testimony in order to determine whether the contradiction was the result of fallible memory, and, if so, when the truth was told, and since the question was passed upon in a former appeal it will be treated as having been adjudicated and the question will not be reopened. Ib.

5. **Damages: Valuation of Property.** The plaintiff, an insurance company, issued a policy of fire insurance to a corporation engaged in mining coal. The policy covered a large number of "company or camp houses" each valued at $240. A passing engine on defendant's railroad set fire to and destroyed ten of these houses and damaged others to the extent of $25. The plaintiff paid the coal company, and received an assignment of its claim against the railroad company. This action is to enforce the claim against the latter. *Held*, that the defendant's liability, either to the coal company or its subrogated insurer, was the actual value of the destroyed and damaged property at the time of the fire. Globe & Rutgers Ins. Co. v. Railroad, 542.

6. **Same: Statute.** Under Sec. 3151, R. S. 1909, a railroad company by setting out a fire is liable to the owner for the actual damages sustained for all property destroyed. But under Sec. 7020, R. S. 1909, the liability of an insurance company, as the insurer of property is not valued by the actual value of the property destroyed by the fire, but by the value stated in the contract of insurance. Ib.

7. **Same: Privity of Contract.** While there is not privity of contract between the railroad company and the insurance company, yet the insurer is *practically* the surety for the railroad company, the principal. And wherever the insurer has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. Ib.

8. **Same: Evidence: Similar Property: Aid to Jury.** The evidence of sales of a similar property to that in question, made in the neighborhood, about the same time, was admissible to aid the jury in determining the damages done by the fire to which the owner was entitled. Ib.

FRATERNAL BENEFICIARY ASSOCIATIONS.

1. **Failure to Pay Assessment: Forfeiture of Certificate.** Under a by-law of a fraternal beneficiary association, providing that if a member failed to pay a monthly assessment on or before the last day of the month, he should stand suspended and the certificate

Digitized by Google

FRATERNAL BENEFICIARY ASSOCIATION—Continued.

should be void, the failure of a member to pay an assessment on or before the last day of the month would *ipso facto* effect a forfeiture of all rights under his certificate. Day et al. v. Woodmen Circle, 260.

2. **Members' Knowledge of By-Laws: Presumptions.** A member of a fraternal beneficiary association is conclusively presumed to know the provisions of its constitution and by-laws. Ib.

3. **Same: Forfeiture for Nonpayment of Assessment: Waiver.** Where the clerk of a subordinate lodge of a fraternal beneficiary association accepted payments of a past-due assessment from the husband of a member who had been suspended for nonpayment of such assessment, on his statement that his wife was "all right", when, in fact, she was suffering from an illness from which she shortly thereafter died, and the supreme governing body of the association had no knowledge of the clerk's action, such action was not a waiver by the association of the provisions of a by-law, requiring, as a condition precedent to reinstatement after suspension for nonpayment of an assessment, that the member personally appear and apply for reinstatement within a stipulated time, or send to the clerk a written statement on an official form furnished by the association, to the effect that he or she is in good health. Ib.

4. **Same: Action on Certificate: Forfeiture for Nonpayment of Assessment.** In an action on a certificate issued by a fraternal beneficiary association, *held* that insured was automatically suspended, under the constitution and by-laws of the order, for nonpayment of an assessment, and that she was not reinstated by virtue of an unauthorized acceptance, by the clerk of the subordiante lodge to which she belonged of the past-due assessment, and that such acceptance was not a waiver of the provisions of the by-laws prescribing a different mode of procedure for reinstatment, inasmuch as the supreme governing body of the order had no knowledge thereof; and hence it is *held* that a recovery could not be had on the certificate. Ib.

5. **Premiums: Suspension for Nonpayment.** Where the by-laws, rules and regulations of a fraternal insurance order provides that failure to pay the specified monthly premiums on or before the last day of the current month shall cause the member to be suspended without further action of any kind, any member failing to pay such monthly premiums is, *ipso facto*, suspended at midnight on the last day of said month and, if death occurs during such suspension, such member's policy cannot participate in any of the funds or benefits of the order, unless the suspension and forfeiture caused thereby has been waived by the company. Keys v. Knights and Ladies of Security, 671.

6. **Same: Waiver.** In the case at bar, waiver may be of two kinds, first, waiver of forfeiture by accepting and retaining premiums with knowledge of the facts constituting the forfeiture, or by retaining the premiums after receiving knowledge of the facts, and, second, waiver of the defense of forfeiture by failing to assert a forfeiture after a loss has occurred, and, with knowledge of such forfeiture, inducing the beneficiaries under the policy to go to trouble and expense in complying with the terms of the policy as if it were in force. Ib.

7. **Same.** Waiver, by acceptance of premiums, is not based on contract, but on estoppel of the company to insist upon conditions of the policy inconsistent with the acceptance or retention of the

Digitized by Google

FRATERNAL BENEFICIARY ASSOCIATION—Continued.

premiums. While waiver is a matter of intention, this means the intention the law will infer from a given course of conduct and not the mere purpose the insurer may have had in mind. Waiver arises from the doing of inconsistent acts. The intention to waive is gathered from what is done. And if a forfeiture has been once waived it cannot be subsequently revived and relied upon to defeat a recovery after a loss has happened. Keys v. Knights and Ladies of Security, 671.

8. **Same.** Where the rules prescribe that a member, suspended for failure to pay dues, may be reinstated, without a health certificate upon payment of said dues at any time within sixty days from suspension, provided such member is in good health, the forfeiture caused by such delinquency and ill health is waived by the acceptance of premiums with knowledge of such ill health. And, if in addition to the above, the rules prescribe that a member, paying up delinquent dues, after the lapse of sixty days from suspension, shall furnish a medical certificate of good health, then the known acceptance of dues so paid, without requiring the health certificate, is a waiver of the ill health and of the forfeiture caused thereby. Ib.

9. **Same.** A waiver of a defense cannot be inferred from mere silence of the company. It is not obliged to do or say anything to make the forfeiture effectual. But if, after knowledge of the forfeiture, negotiations or transactions are had with the insured in which the company impliedly recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is waived as matter of law, and such waiver need not be based upon any new agreement or an estoppel. Ib.

10. **Same: Evidence: Jury Question.** Where the issue is whether or not the company has followed a course of conduct which may be said to indicate waiver, the question of waiver is one for the jury. And where there is evidence from which waiver may be inferred the question must be left to the jury. Ib.

FOREIGN CORPORATIONS. **See Insurance.**

FRAUD. **See Bills and Notes.**

FRAUD AND DECEIT. See **Principal and Agent.**

1. **Fraudulent Misrepresentations: Sufficiency of Evidence.** In an action for damages alleged to have been sustained as a result of alleged fraudulent misrepresentations of a real estate agent, relating to the exchange of properties between plaintiff and defendant, evidence *held* to fail to show that misrepresentations were made. Camren et al. v. Squires, 272.

GUARDIAN AND WARD. **See Executors and Administrators; Insane Persons.**

GUARDIAN AD LITEM.

1. **Next Friend: Action by Minor: Appearance.** The appearance of an infant plaintiff in court without a guardian or next friend does not close the door of the court against him, but imposes a duty on the court to appoint a guardian to represent him. A minor may be brought into court as a defendant by service of process, or he may submit himself to the jurisdiction of the court as a plaintiff after which, in either case, it becomes the duty of the court to appoint a guardian *ad litem* to represent him. Hanlin v. Burk Bros., etc., Co., 462.

Digitized by Google

HIGHWAYS. See Roads and Highways.

HUSBAND AND WIFE. See Damages; Partition; Witnesses.

1. **Principal and Agent: Agency of Husband: Acts Binding on Wife.** Where a husband and wife together owned a farm and the wife made the husband her agent for its sale, she was bound by his negligence in effecting an exchange thereof, and hence, although the property taken in lieu of it was of much less value, she was not entitled to recover. Camren et al. v. Squires, 272.

2. **Separate Property: Consent: Divorce.** Though in order to be effectual under the statute, a wife's consent to her husband's leasing her land and collecting the rent must be in writing, yet she may, after divorce from him, be bound by her acts of recognition of the lease and the tenant. Shull v. Cummings, 569.

INDICTMENTS AND INFORMATION. See Food; Larceny.

1. **Statutory Offense.** Where an indictment or information is based on a statute creating an offense unknown to the common law, it must set forth and charge all the constitutive facts required by the statute to constitute the offense necessary to bring the accused fully within its provisions. State v. Shortell, 153.

2. **Sufficiency of Charge: Intendment.** Every material fact necessary to constitute the offense must be alleged in the indictment or information, and nothing is to be taken by intendment or implication. [REYNOLDS, J. P., dissents.] Ib.

INJUNCTION.

1. **Mandatory: Equity: Obstructions in Public Highway.** The defendant was indicted and convicted for obstructing a public road. He paid the penalty imposed but did not remove the obstruction and this action was instituted by the prosecuting attorney to enforce its removal. The defendant, the owner of a farm, erected a fence eight or ten feet outside of his property line and on the adjacent public highway. *Held*, that the power and jurisdiction of a court of equity to give speedy and complete relief to the public in such case cannot be successfully questioned. State ex rel. v. Feitz, 456.

2. **Same: Public Nuisance.** A prosecuting attorney is authorized by law to prosecute an action in equity in behalf of the State to enjoin a public nuisance, notwithstanding the existence of other civil and criminal remedies. Ib.

3. **Same: Criminal Laws.** A court of equity will not undertake to enforce the criminal laws; therefore it will not join the commission of a threatened act merely because the act would be a crime, but, on the other hand, neither will it withhold its equitable relief in a case in which for other reasons it has jurisdiction, merely because the act when committed would be a crime. Ib.

INSANE PERSONS.

1. **Judgment: Notice: Collateral Attack.** A judgment of the probate court adjudging a person to be insane which shows that such person was never notified of the proceedings is void, notwithstanding it notes that he was confined in an asylum, and may be collaterally attacked; and the appointment of a guardian is likewise void. Citizens State Bank of Trenton v. Shanklin, 639.

Digitized by Google

INSANE PERSONS—Continued.

2. **Same: Restoration Proceeding.** The fact that an insane person after several years, is restored and proceedings were then begun in the probate court to have him declared sane and his guardian discharged of which he has no notice and with which the only connection he was shown to have was that he was in court as a witness, is not an admission of the validity of the original proceeding which declared him insane without notice. Citizens State Bank of Trenton v. Shanklin, 639.

3. **Same: Guardian and Ward: Expenditures: Collateral Kin.** A guardian of an insane person and the court under which he acts are not so restricted in administrating his estates as is an administrator. The court may authorize expenditures by the guardian, if the estate will justify it, which it is convinced the insane person would have done if in his right mind; and expenditures may be made in some instances for needy collateral heirs. Ib.

4. **Same: Court's Discretion: Intruding Guardian.** While a guardian, under direction of a proper court, may make expenditures to collateral relatives and otherwise act as the court is convinced the insane person would if he had been in his right mind, yet the instances in which the guardian may so administer the estate are those in which a court with jurisdiction has a supervision over the guardian and in which its discretion will protect the estate, and do not extend to a guardian who intrudes himself into the guardianship. Ib.

5. **Same: Intruding Guardians: Accounting: Necessaries.** One who assumes to act as a guardian for an insane person, without a valid appointment, and who makes expenditures in behalf of his ward may have an accounting and be allowed as credits all expenditures for necessaries for the insane person and his family. Ib.

6. **Same: Necessaries: Life Insurance Premiums: Children Over Majority.** Necessaries for the family of an insane person which a guardian may provide, do not include money given to a married son more than thirty years old; nor to a daughter for medical attention who was over twenty-one years of age and who was living to herself and earning her own living; nor will it include burial expenses for such daughter. But payments of premiums on life insurance taken out by the insane person when in his right mind, are necessaries and should be allowed as a credit to one who acted as guardian under a void appointment. Ib.

INSTRUCTIONS. **Accident Insurance; Appellate Practise; Crimes and Punishments; Damages; Negligence; Practise, Trial; Real Estate Brokers.**

1. **Undisputed Facts.** An instruction is erroneous which directs a verdict on a claim for pasturing and boarding a horse on the mere finding by the jury of the fact (not undisputed) that plaintiff did render such services. Burt et al. v. Gabbert, 521.

2. **Same.** An instruction, which tells the jury to return a verdict for plaintiffs, on the finding that they intended to charge for the valuable services, they were to render without requiring the jury to find further that deceased was aware of their intention and on his part intended to pay for such services, is erroneous. Ib.

3. **Defects and Omissions: Cure by Other Instructions.** An instruction, in an action for damages caused by the erroneous transmission of a telegram authorizing the purchase of wool for plaintiff at twenty-two, instead of twenty-one, cents a pound, that the

Digitized by Google

INSTRUCTIONS—Continued.

jury should find for plaintiff if they believed that an error was made in transmitting the telegram, in that, as delivered, it read twenty-two cents instead of twenty-one cents, was not reversible error for not including all of the elements essential to recovery, in view of the defenses, where the defendant's theory was fully covered by instructions given on its behalf, since, in determining the correctness of an instruction, the whole charge should be considered. Jackson v. Telegraph Co., 70.

4. **Submitting Question of Law: Harmless Error.** An instruction for plaintiff which submits a question of law is not prejudicially erroneous if its only effect is to require a finding of more than is necessary to entitle plaintiff to recover. Wallace v. Ins. Co., 110.

5. **Defects and Omissions: Cure by Other Instructions.** Where an instruction for plaintiff in a negligence case, purporting to cover the entire case and authorizing a recovery if certain facts were found, omitted to require certain findings essential to a recovery by plaintiff and ignored the defense of contributory negligence, but, in instructions given for defendant, the facts omitted were supplied and one on contributory negligence was properly given, the error was thereby cured, since, in determining the correctness of an instruction, the whole charge should be considered. Bliesner v. Distilling Co., 139.

6. **Conflicting Instructions.** The giving of a misleading instruction constitutes reversible error, although another instruction correctly declares the law with respect to the subject-matter covered by the misleading instruction. Cole v. Crump et al., 215.

7. **Facts Not Essential: Reversal of Judgment.** Where an instruction requires a plaintiff to establish a fact not essential nor even pertinent to his cause of action it is error, but if it is against the plaintiff alone and harmless, it does not constitute a good ground for the reversal of a judgment. Martin v. Coal Co., 141.

8. **Damages: Temporary Nuisance.** An instruction which authorized the jury to allow damages that were not special to plaintiff but were common, and which permitted plaintiff to recover for depreciation in the market value of her property caused by the nuisance as though the nuisance and its injurious consequences to plaintiff were permanent is erroneous, because the nuisance, created by the laying and maintaining of a railroad track in a public street without lawful right or authority, being subject to abatement by legal process, must be regarded as temporary. Wright v. Railroad, 446.

9. **Evidentiary Issues.** When facts are indisputably established, that the statutory crossing signals were given by the engineer of the passenger train, it was not error to restrict the jury's consideration of the case to evidentiary issues. Fife v. Railroad, 655.

10. **Same: Assuming Facts as Proved.** An instruction which assumes as a proved fact that the damage to plaintiff was caused by negligence of defendant concurring with negligence of the servant of plaintiff, it is not error to refuse it. Ib.

11. **Omission in.** An instruction defining waiver, which was the real point at issue in the case, cannot be upheld where, on account of the omission therefrom of certain words, it is meaningless. In such case the argument made to the jury cannot be looked to in order to learn whether the jury were informed of what was its meaning. Instructions are difficult enough to understand without

Digitized by Google

INSTRUCTIONS—Continued.

requiring the jury to guess at the meaning or at what was intended to be said in the instruction. Keys et al. v. Knights & Ladies of Security, 671.

12. **Care Required of Plaintiff.** Where a number of instructions telling the jury the care required of plaintiff before she was entitled to recover were given, some of them on one side and at least one on the other, it was not error to refuse another. Price v. City of Maryville, 698.

13. **Employment: Individual.** Where it is conceded that a defendant employed the plaintiff to render services, but contended that the employment was for others and not individually, an instruction which omits to submit whether plaintiff knew he was not acting for himself is erroneous. Hatfield v. Swift, 705.

INSURANCE, ACCIDENT. See **Accident Insurance.**

INSURANCE.

1. **Action on Policy: Venue.** An action on an insurance policy is transitory and may be instituted anywhere that service can be had on insurer. Hartung v. Ins. Co., 289.

2. **Same: Foreign Company: Action on Policy: Venue.** Under Sec. 7043, R. S. 1909, an action against a foreign insurance company may be instituted in any court in the state. Ib.

INTERSTATE COMMERCE. See **Common Carriers.**

1. **Rates Not Subject of Contract.** Interstate Commerce rates, when duly filed and approved, are fixed by law and, therefore not the subject of contract between the parties. Amer., etc., Mfg. Co. v. Railroad, 184.

2. **Same: Presumption of Reasonableness of Rates.** The question of the reasonableness or unreasonableness of rates established in accordance with the Interstate Commerce Act, and the conditions attached to them, is not one for the courts to determine in the first instance, but primarily is committed to the Interstate Commerce Commission, and, therefore, it is the duty of the courts to treat with such rates and annexed conditions as being reasonable and just, whatever may be their views on the subject. Ib.

INTOXICATING LIQUORS. See **Dram Shops.**

JUDGMENTS. See **Appellate Practise; Executors and Administrators; Insane Persons; Mandamus.**

1. **Equity: Res Adjudicata.** Where the issues sought to be raised as a defense to a suit brought in this State on a judgment rendered and revived in another State, were raised and litigated between the same parties in an equity suit brought to subject defendant's property to such judgment, the adjudication of such issues in the equity suit is conclusive, not only as to the matters of defense pleaded in such equity suit, but also as to every matter properly belonging to the subject in litigation and which defendant might, by exercising reasonable diligence, have brought forward at the time. And such issues cannot be again raised as a defense to a suit on the former judgment. They have become *res adjudicata.* Mallory v. Patterson, 605.

2. **Same: Failure to Make Defense.** When one fails to make all the defenses he is called upon by the nature of the proceedings to

Digitized by Google

JUDGMENTS—Continued.

make, such failure is as effective in a subsequent suit to prevent him from insisting upon them as if they had in the former suit been pleaded and been adjudged adversely to him. Ib.

3. **Same: Judgment of Revivor.** An adjudication of revivor is *res adjudicata* as to all matters which were or might have been set up in the proceedings to revive. Ib.

4. **Same: Power of Equity.** If a defense exists at the time judgment is rendered, and could with reasonable diligence have been set up at that time, then even equity will not interfere to destroy the judgment. Ib.

JURISDICTION. **See Executors and Administrators; Tax Bills.**

JURY QUESTION. **See Contracts.**

JUSTICES' COURTS.

1. **Pleading: Requisites of Statement.** Formal pleadings are not required in actions instituted in a justice's court, and a statement is sufficient if it affords reasonable notice to defendant of the claim relied on and is definite enough to operate as a bar to another suit. Wallace v. Ins. Co., 110.

2. **Same: Life Insurance: Action on Industrial Policy: Sufficiency of Statement.** In an action instituted in a justice's court on an industrial life insurance policy, *held* that the statement afforded reasonable notice to defendant of the claim relied on and was definite enough to operate as a bar to another suit, and, therefore, was sufficient; *held further*, that plaintiff, a brother of insured, was entitled to recover, without amending the statement, on the theory that insurer's agent agreed with insured and plaintiff that, upon the death of insured, the amount of the policy would be paid to plaintiff, although the policy, on its face, was payable to the personal representative of insured. Ib.

JUSTICES OF THE PEACE. **See Justices' Courts.**

LANDLORD AND TENANT. **See Tenant.**

LARCENY.

1. **Petit Larceny: Sufficiency of Information.** An information, in a prosecution for petit larceny, charging that defendant, on a certain day and in a certain place, unlawfully and willfully stole, took and carried away, of the money and property of a person named, $1.08 of the lawful money of the United States, of the value of $1.08, was sufficient. State v. Miles, Jr., 181.

LIFE INSURANCE. **See Insane Persons; Justices' Courts.**

1. **Industrial Policy: Enforcement: Policy of Law.** It should be the policy of the law to enforce industrial life insurance policies without administration where possible, since the chief object of this form of insurance is to provide a fund to defray funeral and last illness expenses, which will be available when needed and not be subject to the delay and costs incidental to administration. Wallace v. Ins. Co., 110.

2. **Same: Representations of Agent: Designation of Beneficiary: Instructions.** In an action on an industrial life insurance policy which was payable to the personal representative of insured, where plaintiff, insured's brother, claimed as beneficiary by reason of

Digitized by Google

LIFE INSURANCE—Continued.

an agreement made by insurer's agent with insured and plaintiff that, upon the death of insured, the amount of the policy would be paid to plaintiff if he was in possession of it at that time, the court instructed the jury, at the instance of plaintiff, that if the jury found that, at the time he applied for the policy, insured stated to insurer's agent that he desired it made payable to his brother, and the agent informed him that it would be payable to his brother or any other person who might present it to insurer after the death of insured "*and that the policies issued by the defendant were so payable to the person presenting the same after the death of the insured,*" their verdict should be for defendant. *Held*, that the clause italicized referred to the representations of the agent concerning the person to whom the policy was payable, and hence did not submit a question of law to the jury; *held, further*, that even if it could be held that the clause submitted a question of law, the error would not be prejudicial since it would simply require the jury to find more than was necessary to entitle plaintiff to recover. Wallace v. Ins. Co., 110

3. **Industrial Policy: Authority of Agent: Designation of Beneficiary.** Reason and justice require that a life insurance company should be bound by the acts of an agent who solicits industrial insurance, delivers the policy, collects the weekly premium due thereon and is the only representative of the company with whom the insured deals or comes in contact; and hence a life insurance company was bound by a statement made by its agent at the time an industrial policy was issued, in response to a request by insured that his brother be made beneficiary, that it was not necessary that the brother be actually named as beneficiary and all that was needed was for him to have possession of the policy, and the brother, who had possession of the policy at the time of insured's death, was entitled to recover thereon, although, on its face, it was payable to the personal representative of insured. Ib.

4. **Same: Evidence: Varying Written Instrument.** Where an industrial life insurance policy provided that it should be payable to the personal representative of insured unless payment should be made as provided for by the so-called "facility of payment" clause, which authorized the company to make payment to any relative or any other person equitably entitled to the same, parol evidence that the agent negotiating the insurance informed the insured and plaintiff, the insured's brother, whom the insured desired to make beneficiary, that the proceeds would be paid to plaintiff if he produced the policy, was not admissible as tending to vary the provisions of a written instrument, since the policy was not, by its terms, payable to the personal representative absolutely and in any event and the "facility of payment" clause provided that payment might be made to any one in the position of plaintiff coming within the class there designated. Ib.

5. **Designation of Beneficiaries: Construction of Policy.** A life insurance policy for the benefit of the widow and children of insured, which stipulates that insurer will pay to the "beneficiary or their executors or administrators" the amount of the policy, and in case of the death of the "said beneficiary before the death of" insured, the amount shall be paid at maturity to the heirs or assigns of insured, designates the beneficiaries as a class, and there is no divestiture unless all of the class die prior to the death of insured; and hence where one insured by such a policy died, leaving a wife and four children, and grandchildren of a deceased child who was living at the time the policy was issued but who died

Digitized by Google

LIFE INSURANCE—Continued.

before insured died, the one-sixth interest of the deceased child in the proceeds of the policy passed to her husband and children. Hartung v. Ins. Co., 289.

6. **Same: Action on Policy: Parties: Joinder.** The grandchildren of an insured in a life policy, who, on the death of insured, took, by descent and purchase, their deceased mother's vested interest as beneficiary under the policy, could jointly maintain an action against the insurer to recover that interest. Ib.

7. **Terms of Application: Beneficiary.** The plaintiff, a minor, brought suit by next friend on two policies of ordinary life insurance issued to her mother by the defendant. The mother died and defendant refused to pay the policies on the ground that neither policy had been delivered to the assured and that the minor plaintiff was not the beneficiary of either policy. *Held*, that the plaintiff properly recovered for the value of the two policies. Pierce v. Ins. Co., 383.

8. **Same: Waiver.** A party has the right in an application for insurance to stipulate when and under what conditions the contract shall go into effect, and where the application provides that the insurer shall not become liable as such until the payment of the initial premium and the delivery of the policy to the assured, such provision will be enforced and no recovery will be allowed against the company if the death of the applicant occurs while such conditions remain unperformed. But a stipulation of this character being primarily for the benefit of the company may be waived by the company either by subsequent express agreement or by the conduct of the parties bespeaking a mutual intention to disregard it and to treat it as inoperative. Ib.

9. **Same: Death of Applicant.** There is no contract of insurance if the party insured reserved the right to accept or reject the policies when they were presented to him and he dies before he exercised that option. Ib.

10. **Same: Change of Beneficiaries.** Where policies of insurance erroneously designate a beneficiary and the parties to the contracts agree to a change of beneficiary before the delivery of the policy and payment of the premiums, for the purpose of correcting the error, there is not a technical change of beneficiaries within the meaning of the terms of the policy but merely the designation of the beneficiary named in the applicant's proposal. Ib.

MANDAMUS. See **Dram Shops.**

1. **Appeal: Specific Judgment.** Mandamus will not be allowed to perform the office of an appeal and when there is a complete remedy by appeal the writ should be denied. But this rule presupposes there is a matter in question which is the proper subject of litigation. It does not apply to an instance where the circuit court refuses to obey the directions of a mandate to enter a specific judgment, as in such case the remedy is mandamus. State ex rel. v. Lamb, 360.

2. **Same: Alternative Writ: Amendment.** If the alternative writ asks for more than can be given by the peremptory writ, the latter should not be granted. Though in such case an amendment might be made. Ib.

3. **Nature of Writ: Issuance Rests in Sound Judicial Discretion.** A peremptory writ of mandamus is not a writ of right. Cases may arise where the applicant for relief has an undoubted legal right,

Digitized by Google

MANDAMUS—Continued.

for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise judicial discretion, still refuse to issue the writ. State ex rel. v. Bank, 589.

4. **Same: Mere Naked Right.** It will not be granted to enforce a mere naked right. Ib.

5. **Same: Other Remedy Open to Relator.** Although the existence of an equitable remedy open to relator will not deprive a party of his legal remedy by mandamus, yet the fact that an equitable remedy exists may influence the exercise of the court's discretion as to whether it will issue the writ. And if an equitable proceeding will cover the entire subject in dispute, and the court in such equity case can grant general as well as special relief, then the writ of mandamus will be refused. Ib.

6. **Same: Not Issued Conditionally: Peremptory Writ Must Follow the Alternative.** Conditional writs of mandamus are never issued. The peremptory writ always issues in the same terms as the original writ except that the former includes the word "peremptorily" and omits the alternative of showing cause for noncompliance. Nor can the peremptory writ be altered to suit what upon the return may be considered the justice of the case. The peremptory writ can grant no relief not specified in the alternative writ, and if not warranted in granting that must refuse any. The writ cannot be granted upon equitable terms, for while equitable rights may be considered by the court in determining whether the writ shall issue, yet when it does issue equity can have nothing further to do with it. Ib.

7. **Same: Return: Tendering Issue.** If an issue on the facts is to be tendered the return must specifically deny such facts. The return may, however, be in the nature of a plea by way of confession and avoidance, in which case it must set up all the facts necessary to prevent the writ being issued. Or it may set up facts which may not prevent the writ from issuing but which will appeal to the court's discretion as to whether the writ shall go. The court is not bound to take the case as the applicant puts it but may consider all the facts in deciding whether it will issue the writ or not. Ib.

MAINTENANCE. See Appellate Practice.

Sufficiency of Evidence. In an action by a wife against her husband, who was worth about $20,000, for separate maintenance, evidence *held*, to justify a judgment allowing her twenty dollars a month and $150 suit money. Bante v. Bante, 123.

MARRIED WOMAN. See Witnesses.

MASTER AND SERVANT.

1. **Negligence: Assistant Superintendent: Laborer.** Though one is a civil engineer and an assistant superintendent in the construction of a bridge across a river, yet on the order of his superior, in which he acquiesces, he may become a common laborer under the direction of a foreman to whom he is assigned; for it is the service and not the rank which determines the capacity in which he acts. Hedrick v. Kahmann, 57.

2. **Same: Volunteer: Laborer.** An assistant superintendent in constructing a bridge who by order of his superior takes up the work

Digitized by Google

MASTER AND SERVANT—Continued.

of a common laborer under a foreman, is not a volunteer disabled from recovering damages resulting from the foreman's negligence. Ib.

3. **Same: Fellow Servant: Foreman.** An assistant superintendent in constructing a bridge, who by order of his superior takes up the work of a common laborer under the direction of a foreman, is not a fellow servant of such foreman. Ib.

4. **Same: Negligence: Material: Selection: Foreman.** Though a master may furnish suitable material with other that is not suitable, yet if the selection of proper material is left to the servant and he selects the unsuitable kind, the master cannot be held liable to him or his fellow servants. But if the master's representative, in the person of a foreman, selects the unsuitable material, the master is liable to any servant injured thereby. Cases distinguished. Ib.

5. **Same: New Trial: Substantial Evidence.** Where the trial court grants a new trial to a defendant on the ground that a peremptory instruction should have been given to find for such defendant, it is error if there is any substantial evidence to support the verdict under the law. Ib.

6. **Injury to Servant: Liability of Master.** A revolving cylinder of a jute separating machine, to which was attached knives, was completely covered by a guard, except a slit, about one inch wide and extending the length of the cylinder, into which the jute was fed. Plaintiff, an employee, was ordered to clean the machine, and in an endeavor to reverse, with his hand and while the cylinder was revolving, jute which had fallen into the slit, his hand came in contact with the knives and was injured. *Held*, that whether the master, by the exercise of reasonable prudence, could have foreseen injury would happen to the servant by reason of the cylinder being in motion while he was cleaning the machine, is a matter of doubt. Finuta v. Amer. Mfg. Co., 87.

7. **Same: Duty of Master.** The master is required to use only such reasonable precautions to prevent accidents to his employees as would have been adopted by prudent persons prior to the accident. Ib.

8. **Same: Contributory Negligence.** A revolving cylinder of a jute separating machine, to which was attached knives, was completely covered by a guard, except a slit about one inch wide and extending the length of the cylinder, into which was the jute was fed. Plaintiff, an employee, was ordered to clean the machine, and in an endeavor to remove, with his hand and while the cylinder was revolving, jute which had fallen into the slit, his hand came in contact with the knives and was injured. *Held*, that the slightest care or observation by plaintiff would have disclosed to him that the cylinder was revolving and that it was dangerous for him to put his hand into the slit, and hence he was guilty of contributory negligence, barring a recovery for his injuries. Ib.

9. **Injury to Servant: Liability of Master: Question for Jury.** In an action by a servant for the loss of an eye, caused by a wire springing from the hands of the foreman and striking it while the foreman was endeavoring to thread the wire into the bobbin of a cable-winding machine, evidence *held* to justify submission to the jury of the question whether the foreman was guilty of negligence in permitting the wire to slip from his hand, although the testimony showed that he handled it in the manner wires had been

Digitized by Google

MASTER AND SERVANT—Continued.

handled for years and that no such accident had happened before. Mertz v. Rope Co., 94.

10. **Dual Capacity Doctrine: Vice Principal or Fellow Servant.** An operator of one of three machines, who had no authority over the other operators except when the three machines were operated together as a unit, at which times he superintended their operation and governed and directed the movements of the other operators, was a fellow servant of the other operators when the machines were operated separately, and a vice principal when they were operated as a unit. Ib.

11. **Same.** The "dual capacity" doctrine is firmly established in our law. Ib.

12. **Same: Non-delegable Duties of Master: Warning.** The master's duty to warn a servant of a danger is a non-delegable duty. Ib.

13. **Same: Injury to Servant: Dual Capacity Doctrine: Concurring Negligence.** Where a servant is injured through the negligence of one who, in the performance of some duties, is his fellow servant, and in the performance of others, is a vice principal, and the latter's negligence as a fellow servant concurs with his negligence as a vice principal in causing the injury, the master is liable. Ib.

14. **Same: Facts Stated.** Plaintiff was employed to operate one of three cable-winding machines. At the time of his injury, the three machines were coupled together and operated as a unit, under the superintendency of one of the other operators. One of the bobbins on plaintiff's machine having run out of wire, the superintending operator started to insert a new wire, and directed plaintiff to watch the work so that he could do it the next time. The superintending operator negligently took the end of the wire between his thumb and fingers, which were covered with oil, to thread the wire into the bobbin, and plaintiff, being near-sighted, placed his face in close proximity to the bobbin, in order to see the operation, and the end of the wire sprung from the superintending operator's hand, struck plaintiff's eye and put it out. *Held*, that if it be conceded that the superintending operator was a fellow servant in putting the wire on the bobbin, yet, in instructing plaintiff and in giving the order to watch the work, he was a vice principal, and his failure to warn plaintiff of the danger of obeying the order rendered the master liable, since the master is liable for the concurring negligence of a vice principal and fellow servant. Ib.

15. **Appliances: Duty of Master.** It is the duty of the master to furnish a servant with reasonably safe appliances with which to work. Bliesner v. Distilling Co., 139.

16. **Same: Injury to Servant: Appliances: Duty of Master.** In determining whether a master was negligent in not furnishing a servant with a reasonably safe appliance with which to work, the master need not have anticipated the very injury complained of, nor that it would have occurred exactly as it did, but it is sufficient if his negligence was the approximate cause of the injury resulting from the servant's use of the appliance. Ib.

17. **Same: Question for Jury.** In an action by a servant for injuries received as a result of putting his finger into the cylinder of a corking machine, the edges of which were rough, for the purpose of removing small particles of cork which were lodged therein, *held* that a reasonably prudent man would have anticipated that in-

Digitized by Google

MASTER AND SERVANT—Continued.

jury might occur by reason of the defect, and that the question of the master's negligence was, therefore, for the jury. Ib.

18. **Same: Simple Appliance Doctrine: Applicability.** A master cannot be relieved from liability for injury to a servant on the ground that the instrumentality causing the injury was a simple appliance and that danger did not inhere in the appliance itself but arose from the manner in which it was used, where the injury occurred from the use of the appliance in the manner that the master expected and required the servant to use it. Ib.

19. **Same: Assumption of Risk.** A servant never assumes the risk of the master's negligence, but only such risks as are incident to the employment after the performance by the master of that which the law requires of him. Ib.

20. **Same: Dangerous Appliances: Contributory Negligence.** Mere knowledge on the part of the servant of the danger of using a defective instrument or appliance will not preclude a recovery by time on the ground of contributory negligence, unless the danger is so obvious and imminent that a man of ordinary prudence would, under the circumstances, refuse to continue to work with the instrumentality; and whether the danger was so obvious and imminent as to make him guilty of contributory negligence is a question for the jury unless the evidence so conclusively shows such to be the fact that reasonable men could not differ with respect thereto. Ib.

21. **Same: Master's Promise to Repair.** Notwithstanding the fact that the defect or danger in an appliance is known to the servant, yet if he complains thereof to the master and the latter promises to repair the defect or remove the danger, the servant may recover for an injury resulting therefrom within such period as would be reasonable to allow the master for the performance of his promise. Ib.

22. **Same.** Where a servant continued working with a machine after complaint to the master of its defects, and it could be reasonably inferred from the evidence that he was induced so to do by the promise of the master to remedy it, whether such was the inducement was a question for the jury. Ib.

23. **Same: Sufficiency of Evidence.** In an action by a servant for injuries received from a defective appliance, evidence that plaintiff notified defendant's foreman of the defect and that the latter told him to continue using the appliance as he had been doing until another one could be supplied him free from the defect complained of, *held*, tantamount to a promise to repair. Ib.

24. **Same: Question for Jury.** Evidence, in an action by a servant against the master for negligence in furnishing him with a dangerous appliance with which to work, resulting in injury to him, *held*, to present a question for the jury, whether the servant was guilty of contributory negligence by continuing to work with the appliance after he had knowledge of its danger. Ib.

25. **Damages: Railroads.** While plaintiff was cutting weeds and grass for the defendant along its right of way, his horse fell into a concealed ditch and was so badly hurt that it had to be killed. *Held*, that the injury to the horse was due to a risk assumed by plaintiff and cannot be attributed to any negligence of defendant. Braden v. Railroad, 584.

Digitized by Google

MASTER AND SERVANT—Continued.

26. **Same.** A servant assumes the risks that are ordinarily incident to the service he undertakes. A master is not an insurer of the safety of his servant and the measure of his duty is not to furnish his servant an absolutely safe place in which to work, but a place free from all risks and dangers that are not ordinarily incident to the kind of work the servant is employed to perform. Braden v. Railroad, 584.

27. **Same: Assumption of Risk.** The assumption of a risk appears to involve the facts of comprehension, that a peril is to be encountered and a willingness to encounter it; that is to say, a positive exercise of volition in the form of assent to the risk. Ib.

MECHANIC'S LIENS.

1. **Notice of Claim: Sufficiency.** V., the general contractor, made a contract with B., a subcontractor, to put the plumbing in a certain building being erected. B. made an arrangement with R. by which the two were to buy the supplies and put them in the building. There was some evidence that a partnership had been formed between S. B. and R. under the name of the Berger Plumbing Co.; but whether there was or not, B. and R. were partners in the purchase of the supplies from plaintiff. They partially installed the supplies in the building and then abandoned the job, and the general contractor finished the installation of the supplies purchased. Plaintiff's lien-claim stated that it was for materials furnished under one entire general contract with "J. R. Riley et al., as Berger Plumbing Company, subcontractors under Carl Vrooman, contractor," and the notice to the owner was that a lien would be claimed for the materials furnished by "J. R. Riley et al. as Berger Plumbing Company, subcontractors under Carl Vrooman, the contractor for making the improvements for you." *Held*, that this notice was sufficient and was not invalid because it did not set out the names of those covered by the "et al." in the notice. K. C., etc., Co. v. Vrooman et al., 63.

2. **Same: Variance Between Lien Claim and Partition.** Under the above facts there was no variance between the lien claim and the petition. Ib.

3. **Same: Partnership.** There being no finding of facts, the appellate court cannot tell whether the trial court found against R. as one of the partners or as a joint subcontractor. But as there was evidence tending to show a partnership or at least a holding out of partnership to plaintiff, it will be presumed that the trial court's judgment was based on the fact of partnership either actual or constructive. Ib.

4. **Same: Non-lienable Items in Account.** Where non-lienable items were unintentionally inserted therein, and were easily distinguishable from the rest, and disclaimer was made as to them by plaintiff before judgment and the court struck them out, the inclusion of them in the original account cannot invalidate the lien. Ib.

5. **Entire or Separate Contracts.** Plaintiff contracted with an owner to furnish materials for a building and to deliver them when ordered and as needed. There was no lump sum agreed upon nor time stated when the account should cease, nor was the sale made with reference to any architect's plans of the building. The goods were furnished on a running account with reasonable regularity for nearly a year and up until May. From this time until the following October no materials were ordered or used. The building was not completed in May but the owner ceased operations for lack

Digitized by Google

MECHANIC'S LIENS—Continued.

of money to run his business. Having succeeded in leasing the building in October the owner ordered further materials which were furnished and charged to the account and used in finishing the building. There was no refusal to extend credit further on the part of plaintiff and no closing of the account between the parties. *Held*, that the last items charged in October were not sold under a different contract but the whole account was under one entire general contract, so as to give plaintiff six months from the date of the last items in which to file his lien. The fact that the owner volunteered to pay cash for certain other items not included in the account and did pay cash for them will not change the contract as to subsequent items sold on credit as before unless the vendor refused to sell longer on the old contract. Badger Lbr. Co. v. Ice Co., et al., 414.

6. **Same.** Where the evidence is conflicting, or where the circumstances are such as that different inferences may be drawn from the same facts, the question whether goods are sold under one or under different contracts is for the jury. But where there is no dispute as to the facts, the question is one of law for the court. Ib.

7. **Same: Running Account.** A running account is a mutual account between buyer and seller in which is charged from time to time, as ordered, the materials sold, and on which is entered the various credits to which the seller is entitled. Ib.

8. **Same.** If the work to be done is distinct and separate in its nature, and is performed at different times, or if two different contracts are in fact made for different parts of the work, these are marks to show that there was not one entire general contract covering the whole account. But if material is furnished all going to the same general purpose, though such work be done or ordered at different times, yet if the several parts form an entire whole, or are so connected together as to show that the parties had it in contemplation that the whole should form but one and not distinct matters of settlements the whole account must be treated as a unit. Ib.

MONEY HAD AND RECEIVED.

Voluntary Advancements. Plaintiff, acting as an insurance broker, placed some insurance for a client with another insurance agent. It was a custom of these two having mutual dealings with one another to settle at the end of the month, the one owing the larger amount paying the other the difference between the two accounts. At the end of the month the insurance agent settled with plaintiff deducting the amount of the premiums due on the insurance from the amount due plaintiff. To this plaintiff made no objection. Before plaintiff could collect the amount of the premium from his client, the client died. The insurance companies carrying the insurance afterward went into the hands of receivers, and the agent paid all premiums in his hands to the receivers, including the premium so paid by plaintiff. After the death of the client, plaintiff attempted to collect the amount advanced in premiums from his client's estate, but the probate court denied his claim, and thereupon plaintiff brought this suit against the agent. *Held*, that the money was voluntarily advanced by plaintiff to pay for his client's insurance, and, since the agent to whom it was advanced had paid it over to the receivers, he could not recover it from the agent on the ground that the insurance was worthless, or on the ground that the agent had appropriated it without plaintiff's consent. Walmsley v. Stowell et al., 67.

Digitized by Google

MOTIONS TO RETAX COSTS.

Statute. Under Sec. 1965, R. S. 1909, a motion of the defendant to retax costs, being filed at the term the judgment was rendered, was timely and was properly sustained. Globe & Rutgers Ins. Co. v. Railroad, 542.

MOTION FOR NEW TRIAL. See New Trial.

MUNICIPAL CORPORATIONS. See Negligence; School Districts.

NEGLIGENCE. See Bills and Notes; Carriers of Goods; Carriers of Live Stock; Master and Servant; Telegraph and Telephones.

1. Contributory: Imputed Negligence: Jury Question. Deceased was a lad fifteen years of age. In company with a full grown man, who acted as driver, he rode in the wagon out of a livery stable down an inclined runway to the street upon the track twenty-two and one-half feet away from the starting point, and was there struck and killed. He had no authority or control over the horse, driver or wagon. In such case, if the driver was negligent it cannot be imputed to the boy. There was nothing to cause the boy to anticipate that the horse would go or be driven rapidly upon the track, and the short distance the wagon went before being struck, and the suddenness with which the danger arose, will prevent the appellate court from holding the boy guilty of contributory negligence as matter of law. If there was any evidence showing negligence, or from which it could be inferred, the question of contributory negligence,would be for the jury. Ebert, Admx., v. Railway, 45.

2. Same: Instructions. An instruction attempting to submit the issue of deceased's contributory negligence to the jury should not confuse the non-imputable contributory negligence of the driver with that claimed against deceased since to do so is to confuse and mislead the jury as to the facts from which they could infer contributory negligence against the boy. The refusal of such an instruction is not error. Ib.

3. Same. It is not error to refuse an instruction withdrawing from the jury one of the grounds of negligence charged if there is any evidence showing such grounds or from which it can reasonably be inferred. Neither is it error to refuse an instruction telling the jury that recovery cannot be had unless a specified ground was the sole cause of the injury, where other grounds were specified and the injury may have been caused by the several grounds combined. Ib.

4. Same. An instruction is erroneous, and is therefore properly refused, which tells the jury that the conduct of the motorman just prior to the collision and the speed of the car at that time are "immaterial" if the car was not going more than twenty miles per hour. The conduct of the motorman and the speed of the car just prior to a critical instant are material as throwing light on what was the probable conduct and speed at that instant. Ib.

5. Same: Accident. It is not error to refuse an instruction saying that defendant was not liable if the death was caused solely by an unfortunate accident. Such instruction was not applicable to the facts in this case since it ignored the real issue, namely, the presence or absence of care on the part of the defendant, and did not define or explain the meaning of the term accident. Ib.

6. Same: Burden of Proof. Where the court has given a correct instruction on burden of proof it is not error to refuse another in-

Digitized by Google

NEGLIGENCE—Continued.

struction on that subject a little more strongly worded in defendant's favor. Ib.

7. **Street Railways: Crossing Collision: Vigilant Watch: Failure to Stop Car: Evidence: Inferences.** An inference that the motorman of a street car was not keeping a vigilant watch ahead and did not use every effort to stop the car after danger became apparent could not be drawn from the fact that he failed to stop the car in time to avert a collision with a vehicle crossing the track, where the evidence showed that, when he could have first seen the vehicle, the car was only one hundred feet from the point of collision, but did not show within what distance the car, which was traveling at the rate of twenty-five or thirty miles an hour, could have been stopped. Chappell v. Railway, 126.

8. **Same: "Vigilant Watch Ordinance": Sufficiency of Evidence.** In an action for damages to an automobile, in a collision with a street car at a street crossing, the evidence showed,that, when the motorman could have first seen the automobile the car was only one hundred feet from the point of collision. but did not show within what distance the car, which was traveling at the rate of twenty-five or thirty miles an hour, could have been stopped, nor that the motorman was not keeping a vigilant lookout and did not make every effort to stop the car after the danger became apparent. *Held*, that a recovery could not be had under the "Vigilant Watch Ordinance" of the city of St. Louis, requiring motorman to keep a vigilant watch for persons and vehicles on the track or moving toward it, and, on the first appearance of danger, to stop the car in the shortest time and space possible, since, in order to warrant a recovery under this ordinance, it was necessary for plaintiff to show that the car, traveling at the rate it was, could have been stopped in time to have averted the collision, after the motorman could have seen the automobile. Ib.

9. **Same: Failure to Stop: Negligent Speed.** The fact that a motorman of a street car makes every effort to avoid injury after discovery of the danger, and finds it impossible to do so, will not excuse the street railway company if the motorman was guilty of prior negligence in running the car at an unlawful rate of speed and thereby created the impossibility. Ib.

10. **Same: Evidence: Inferences.** In an action for damages to an automobile in a collision with a street car at a street crossing, it was shown that, when the motorman could have first seen the automobile, the car was only one hundred feet from the point of collision, and that the car was traveling at the rate of twenty-five or thirty miles an hour when it was one hundred feet away and fifteen to eighteen miles an hour when the collision occurred. *Held*, that an inference could not be drawn that the car could have been stopped in time to have averted the collision. Ib.

11. **Contributory Negligence: How Established.** A plea of contributory negligence is an affirmative defense, the burden of establishing which rests upon defendant, but, in carrying this burden, defendant may avail himself of evidence offered by plaintiff, and it is not necessary that defendant introduce testimony to substantiate his plea. Ib.

12. **Street Railways: Contributory Negligence: Failure to Look and Listen.** Street car tracks in a street are in themselves a signal of danger, and the law imposes upon one crossing them the duty of looking and listening, before going on them. Ib.

Digitized by Google

NEGLIGENCE—Continued.

13. **Same: Crossing Collision: Contributory Negligence.** Where, in an action for damages to an automobile in a collision with a car at a street crossing, defendant pleaded contributory negligence of the driver, evidence by the driver that he knew the track crossed the street at the point in question, that, after passing a building that obstructed his view, he could see a car approaching, seventy-five to one hundred feet away, that the automobile was going very slowly, from three to four miles an hour and he could have stopped it in four or five feet, was sufficient to raise the issue of contributory negligence in failing to look or listen and authorize its submission to the jury, although he also testified that he looked and listened before going upon the track. Chappell v. Railroad, 126.

14. **Coal Mines: Drivers.** The plaintiff sued to recover personal injuries sustained while being employed as a driver in the defendant's coal mine. The mine is what is known as a drift mine. The plaintiff drove in a load of empty cars, and proceeded to hitch his mule to a loaded train, which was beyond the empty train. Before he started out another driver dumped his empty train on top of the one that the plaintiff left, leaving one of the cars obstructing the track. The lights were very dim on account of the bad air in the mine and the plaintiff on his outward journey with his loaded train failed to see the obstructing car and his foot was crushed between it and the one on which he was riding. *Held*, that the demurrer to the evidence was properly overruled, the question of contributory negligence being an issue of fact for the jury to determine. Martin v. Coal Co., 441.

15. **Railroads: Overhead Crossing.** Where a railroad crosses or runs parallel to a public road or street the trainmen owe no duty to refrain from making usual and necessary noises incident to the proper and safe operation of a train but to be within the bounds of reasonable care, which is the test of duty, must not operate it in an unusual or unnecessary way and thereby endanger the safety of travelers on the highway. Pontius, Admx., v. Railroad, 576.

16. **Same: Negligence Per se.** It is not negligence *per se* for the whistle of a running locomotive to be sounded under a highway bridge, but engineers should not sound the whistle, when passing under a bridge where horses and vehicles are likely to be passing over at any time. Ib.

17. **Municipal Corporations: Snow and Slush: Footprints.** A city is not liable for the dangerous condition of its sidewalks which comes from snow, which has fallen over a wide extent, partially melting and forming slush which would freeze into uneven surface made by the footprints of pedestrians. But the rule would be different if the slush was by water running across the walk at some definite place. Livingston v. City of St. Joseph et al., 636.

18. **Same: Specific Place in Walk: Water from Hydrant.** A hydrant on property adjoining a sidewalk ran water in the winter time over the premises and down across the walk. It had been in such condition for a great length of time when a snow fell. The water ran into the snow on the walk and made it uneven slush, aggravated by the footprints of pedestrians. This was frozen. A woman attempted to pass over it, when she slipped and fell. It was *held* that this did not make a case for the rule that a city was not liable for the general condition of the entire city, or a large part of it, caused by the elements; but it was distinguishable in that this was a specific place where the dangerous condition existed which could have been readily relieved and the city was liable in damages. Ib.

Digitized by Google

NEGLIGENCE—Continued.

19. **Humanitarian Rule: Railroad Crossings.** The plaintiff sued to recover damages for personal injuries sustained in a collision between the automobile in which he was riding and the defendant's railroad train at a crossing on Franklin street near the defendant's station in Kirksville. When he approached the crossing the driver of the automobile was going at the rate of four or five miles per hour and he failed to observe any train coming until he was within ten or twelve feet from the main track. The train was then about sixty feet away traveling at the rate of twenty miles per hour. It struck the automobile and plaintiff was injured. *Held*, that the plaintiff was not entitled to recover under the humanitarian doctrine. Coby v. Railroad, 648.

20. **Same.** In order for the humanitarian doctrine to be applicable the traveler must not only be in actual peril but his peril must be apparent to one in the position of the operator of the threatening instrumentality while in the exercise of ordinary care and diligence. Ib.

21. **Railroads: Trespassers.** The plaintiff, a minor, by her next friend, sued to recover damages for personal injuries sustained while picking up coal on the defendant's switch tracks. The switch track in question ran through some land owned by a lumber company, a part of which was used by children as playgrounds although they were trespassers. On the day of the accident the plaintiff was requested by a woman to go under a coal car and pick up a lump of coal. While she was under the car, the defendant's employees backed in some cars on the same track, without warning, although they were accustomed to warn anybody that might be in the way, and struck the car she was under, causing it to run over and crush her left leg. *Held*, that it makes no difference whether technically the plaintiff was a trespasser, a licensee, or an invitee, for she was at a place where the defendant's servants had every reason to expect her, or some other child to be. Such knowledge was enough, of itself, to impose a duty on them to give her warning and a negligent breach of such duty resulting in injury would be actionable negligence. Featherstone v. Railroad, 664.

22. **Same.** Where a child is a trespasser on railroad property and is injured in a place where the company had no reason to anticipate her presence, there can be no liability to respond in damages imposed upon the company for the reason that no owner of property is bound to anticipate that his property rights will be invaded. But where a railroad company suffers its property to be used by the public either for the purpose of travel, or of recreation, and knows that it is being so used, it becomes charged with the performance of a duty towards such users to exercise reasonable care to avoid injuring them. Ib.

23. **Damages: Depression in Sidewalk: Actionable Defect: Liability of City.** While it is true that not every depression or uneven place in a sidewalk will constitute an actionable defect, yet a sunken place or a step-off therein, caused by the washing out of the dirt underneath a flagstone in a walk over a drain tile so that the stones sunk down a distance of six to eight inches at one side and the center stone was two inches lower than the stones on either side, will constitute a defect for which the city will be liable if such condition has remained a sufficient length of time before an injury, and the injured person is in the exercise of ordinary care. Price v. City of Maryville, 698.

Digitized by Google

NEGLIGENCE—Continued.

24. **Same: Evidence: Variance.** Where there was evidence that plaintiff was on the walk in the nighttime and stepped into defective place therein causing her to lose her balance and fal into an open ditch at the side of the walk there is no variance between the petition and the proof. Whether plaintiff fell from the walk into the ditch because of the defect or negligently walked into the ditch was for the jury to decide. Price v. City of Maryville, 698.

NEGOTIABLE INSTRUMENTS. See **Bills and Notes.**

NEW TRIAL. See **Master and Servant.**

1. **Practice, Trial: Power of Judge to Grant.** Where one new trial has been granted on the ground that the verdict is against the weight of the evidence, the court has no power to grant another new trial on that same ground. And the fact that misconduct of the jury in the first trial was given as an additional reason for setting that verdict aside will not change the rule. Van Loon v. Railway, etc., Co., 372.

2. **Same: Attempt to Influence the Jury.** But where the second verdict is set aside by the trial judge because it was clearly proven to him that an attempt to improperly reach and influence the jury was made, and the circumstances are so suspicious, in the opinion of the trial judge, that such attempt was not only made but was accomplished, that he is led to set aside the verdict on that ground, the fact that he took into consideration that the verdict was against the weight of the evidence as a circumstance tending to confirm him in such view, will not take away from him the power to set aside the second verdict and grant a new trial. In such event, the verdict may be said, in legal effect, to indicate misbehavior on the part of the jury, and so bring the case within one of the exceptions contained in the statute forbidding the granting of more than one new trial. Ib.

3. **Same: Discretion of the Trial Judge.** Where a verdict is set aside by the trial judge because he is of the opinion improper influences have been exerted, sound public policy requires the appellate court to uphold his action if possible. The trial court is in a better position than anyone else to see and know what is going on, and his action in granting or refusing a new trial ought to be followed if the trial judge exercised his own judgment and did not clearly display a wholly unsound discretion. Ib.

4. **Evidence.** When a new trial is granted and the party obtaining the verdict appeals, an appellate court will take the facts to be what the evidence in favor of such party tends to show them. Oil Well, etc., Co. v. Metcalf et al., 555.

NOTICE. See **Personal Injuries.**

NUISANCE. See **Damages; Injunction; Instructions.**

PARENT AND CHILD.

1. **Head of Family: Divorce.** Ordinarily the father is the head of the family, but, after divorce, the mother who remains unmarried may occupy that relation with respect to the children. In re Ryan, 202.

2. **Same: Support of Child: Divorce.** A minor child surviving his divorced mother is entitled to support from his surviving father, and a minor child of a deceased father is entitled to support from his mother, although she was divorced, unless it is possessed of independent means in its own right. Ib.

Digitized by Google

PARTNERSHIP. See Mechanics' Liens: Pleading.

1. Evidence. Evidence that the parties charged as partners went to the plaintiff's place of business and stated that they were intending to organize a corporation, but until they did so, they would act as partners, and that one of their number would be their field manager and would purchase supplies of plaintiff; it was held, that this was evidence to justify a verdict that they were partners and were liable for supplies afterwards purchased. Oil Well, etc., Co. v. Metcalf et al., 555.

2. Holding Out. A partnership may be shown to exist in fact, or by a holding out as such and either instance will suffice to hold it liable for obligations incurred. Ib.

3. Same: Fraud of One Partner. Evidence that one of several partners induced them to enter the partnership by fraudulent misrepresentations is not admissible against a claim for goods purchased by such partner of one who did not know of the fraud. Ib.

PARTITION.

1. Deed Inter Partes: Husband and Wife. Title. Where two heirs own inherited land as tenants in common and they partition it by making deeds to each other of the parts agreed upon, one of them making his deed to the other and her husband, the latter does not get any title. The deed only conveys what was already the wife's and it only operates to set off the boundaries to her. Skull v. Cummings, 569.

2. Same: Occupancy: Notice: Substituted Plaintiff. If one has notice of a tenant's occupancy at the time of his purchase of land, he is chargeable with notice of the tenant's rights. And if he seeks to oust the tenant by ejectment, and dies after action brought and his heir is substituted as plaintiff in his place and she carries on the suit, she stands in his shoes and is chargeable with the same notice. Ib.

PERSONAL INJURIES. See Carriers of Passengers; Damages.

1. Sewer Inlet: Defective Construction. This is an action by plaintiff to recover compensation from the defendant city for personal injuries he sustained from falling into a sewer inlet in a public street. A sheet iron cover for the inlet became slightly and dangerously, but not noticeably, displaced, when the plaintiff following the ordinary course of a pedestrian stepped upon the cover, which gave way, causing his foot and leg to slip down into the sewer, whereby he was injured. There was evidence tending to show a defective construction of the hooks that held the cover in place. *Held*, that if an injury results from a danger inherent in the plan adopted, the city is not liable, but if the danger has arisen from negligent construction or maintenance of the place, it is liable. Trippensee v. City of Jefferson, 727.

2. Same: Notice. Where, in the original construction of a sewer by the city of which it was charged with notice from the beginning, and which it was under a continuing duty to repair, actual or constructive notice of such defect is not necessary to render the city liable. Ib.

PERSONAL PROPERTY. See Replevin; Sales.

PLEADING. See Carriers of Goods; Carriers of Passengers; Contracts; Executors and Administrators; Justices' Courts; Roads and Highways.

Digitized by Google

PLEADING—Continued.

1. **Exhibits.** With the exception of an action on an account, in which case the account filed may, under Sec. 1832, R. S. 1909, be considered as part of the petition, an exhibit attached to the petition cannot be considered on demurrer. Hartung v. Ins. Co., 289.

2. **Appeal and Error: Reversing With Directions.** When an answer in a cause admits or concedes a certain sum to be due the plaintiff and that concession pervades the entire record and, on appeal, the appellate court remands the cause "with directions to find for the plaintiff the sum shown to be due," such direction does not mean the sum shown to be due by another investigation, but the sum shown to be due by the record. State ex rel. v. Lamb, 360.

3. **Same: Denial: Sole Cause: Confession and Avoidance: Admission.** An answer which does not deny the allegations of a petition showing plaintiff to be entitled to a distributive share of an estate, but sets up a certain sole and only cause why the plaintiff is barred of that right, is a plea in the nature of a confession and avoidance, and the avoidance failing, the confession stands. Such plea is a tacit admission of the claim, but for the special matter interposed. Ib.

4. **Petition: Amendments.** Although a petition states no cause of action, yet if defendant does not demur but answers thereto as if it did state a cause, this saves the petition from being considered such a nonentity as to be incapable of being amended, And if plaintiff obtains leave to, and does, file an amended petition, defendant, by filing answer thereto and going to trial thereon, waives any error, if any, in permitting an amendment. American, etc., Co. v. Sedalia, etc., Co., 485.

5. **Same.** Unnecessary allegations in a petition may be treated as surplusage if they do not change, narrow, contradict or limit the issues upon which recovery is sought. Ib.

6. **Partnership: Individual's Action.** A person having a demand against a partnership may, under the statute, sue any or all of the partners, and aver in his petition that the contract is that of the defendants and to prove this averment he may prove the contract was made for the partners through an agent, and that agent may be one of the partners. Oil Well, etc., Co., v. Metcalf et al., 555.

7. **Same: Prima Facie Case: Declarations: Witness.** After evidence has been given establishing, prima facie, that a partnership exists, the declarations and admissions of one of the alleged partners is proper evidence; and such partner is a competent witness. Ib.

8. **Same.** A partnership bought goods of another through one of its members, and informed the seller that bills should be sent to the purchasing partner which he would approve and forward to the other partners who would pay the amount; it was held that this was not evidence that it was necessary that the seller must procure such approval before he had a right of action. It was merely a statement of a mode of payment. Ib.

9. **Answer Setting Up Fraud: Not Verified.** When the fraud charged pertains to the execution of the instrument sued on, the answer setting up fraud must be sworn to or it will not be sufficient to put fraud in issue. Avery Co. v. Powell, 628.

10. **Sufficiency of Petition: Objection to Introduction of Evidence.** An objection to the introduction of evidence is not effective against a petition which states any cause of action however defectively.

Digitized by Google

PLEADING—Continued.

Against such an objection every intendment will be indulged in favor of the petition. Price v. City of Maryville, 698.

11. **Same.** A petition cannot be said to state no cause of action because it fails to set out an actionable defect where the defect described is sufficient to suggest to the mind of an ordinarily prudent man that it was dangerous, and did not result from a reasonably safe plan of construction made necessary by surrounding conditions. Ib.

PRACTICE, APPELLATE. See **Appellate Practice.**

1. **Exception to Overruling of Motion for New Trial.** When appellant's abstract of the record fails the taking or preservation of any exception to the overruling of the motion for new trial, there is nothing before the appellate court except the record proper. Hopper v. Fullbright et al., 499.

2. **Same: Place of.** An exception to the overruling of a motion for new trial is not a part of the record proper and must, therefore, be preserved in the bill of exceptions. Putting such exception in the record proper does not preserve it. Ib.

3. **Same: Supplemental Abstract.** Where appellant's original abstract fails to show an exception to the overruling of the motion for new trial such defect cannot be cured by a supplemental abstract filed after respondents had filed their brief suggesting the defect, and after the date on which appellant was required to file his original abstract. Ib.

4. **Same.** Even if the supplemental abstract herein could be considered, it would not cure the defect since it still fails to show that the bill of exceptions contains such exception. Ib.

5. **Verdict: Substantial Evidence.** If there is any substantial evidence to support a verdict an appellate court will not disturb the judgment rendered thereon. Hatfield v. Swift, 705.

PRACTICE, TRIAL. See **Appeal and Error; New Trial.**

Instructions: Finding Conclusive. Where a jury is waived and cause submitted to the court without declarations of law, if there is any substantial evidence to support the finding it will be upheld on appeal; and if there is any theory of law under the evidence and pleading which will support the judgment it will be affirmed. Winfrey v. Matthews, 713.

PRINCIPAL AND AGENT. See **Husband and Wife.**

1. **Fraud and Deceit: Misrepresentations of Agent for Both Parties.** A party to a transaction cannot recover against the other party for damages resulting from the fraudulent misrepresentation of one who is agent for both parties, where such other party practices no concealment and gives every opportunity to investigate the condition of the matter concerning which the representation was made. Camren v. Squires, 272.

2. **Authority of Agent: Sufficiency of Evidence.** In an action for damages alleged to have been sustained as a result of alleged fraudulent misrepresentations of a real estate agent, relating to the exchange of properties between plaintiff and defendant, evidence *held* to show that the real estate agent was plaintiff's, and not defendant's, agent in the transaction. Ib.

Digitized by Google

PRINCIPAL AND SURETY.

Contractor's Bond: Liability to Material Man's Vendor. A contractor entered into a contract with a county to place a waterworks and septic tank system in the county home for the aged and infirm, and agreed to give bond to "pay all bills for materials used in said building and labor performed thereon under said contracts." The contractor sublet a portion of the contract to a firm of plumbers who bought of relator the material and plumbing fixtures sued for. These were delivered at the home and a part were used therein by the sub-contractors and the rest by the contractor after the sub-contractors had failed. The contractor was paid in full for the job but did not pay the subcontractors for the balance sued for, nor has relator been paid therefor. The bond was conditioned that the contractor should pay all bills for material used in said building and was made to the county and to all persons having the right to sue thereunder and by virtue of Sections 6761 and 6762, R. S. 1889. As these sections then stood a bond was required which should be conditioned for all material used in the work whether by subcontractor or otherwise: Held that the relator is within the terms of the bond and can sue thereon although the materials were sold by relator to the sub-contractors instead of to the contractors. Jackson Co. ex rel. v. Constructor Co., 28.

PROMISSORY NOTES. See **Bills and Notes.**

PROXIMATE CAUSE. See **Accident Insurance.**

RAILROADS. See **Damages; Negligence.**

1. **Waters and Watercourses: Lateral Ditches.** The duty of a railroad company, under Sec. 3150, R. S. 1909, to construct lateral ditches along its roadbed exists only when there are ditches, drains, or watercourses with which such lateral ditches may connect, but it is not essential that the ditch, drain or watercourse with which they may connect be a running stream—it being sufficient if it be a lake or slough, adequate to receive, and furnishing an outlet for, the water complained of. Pace et al. v. Railroad, 227.

2. **Same: Failure to Construct Lateral Ditches: Damages to Crops: Sufficiency of Evidence.** In an action against a railroad company for damage to growing crops, caused by its failure to construct lateral drains along its roadbed to carry off the water as required by Sec. 3150, R. S. 1909, evidence *held* sufficient to establish that there was a ditch or drain with which the lateral ditches could have been connected and hence it is *held* that the question of liability was for the jury. Ib.

3. **Waters and Watercourses: Failure to Construct Lateral Ditches: Damages to Crops: Instructions.** In an action against a railroad company for damages to growing crops, caused by its failure to construct lateral ditches along its roadbed to carry off the water, as required by Sec. 3150, R. S. 1909, an instruction which did not require the jury to find that lateral ditches could have been connected with a sufficient ditch, drain or watercourse, and which did not require them to find that the draining of the water was obstructed or rendered necessary by the construction of the roadbed, was erroneous. Ib.

REAL ESTATE. See **Real Estate Brokers.**

REAL ESTATE BROKERS.

1. **Right to Commission.** Where the owner sells his land to the customer of a broker employed by him, it is not essential to the

Digitized by Google

REAL ESTATE BROKERS—Continued.

broker's right to recover a commission that the sale be completed within the time or at the price fixed in the contract of employment, provided the broker initiated the transaction within the time limited and the transaction thus initiated was continued by the subsequent dealings between the owner and the customer. Cole v. Crump et al., 215.

2. **Same.** The mere fact that land is not conveyed to a real estate broker's customer, but to a third party, will not prevent the broker from recovering a commission, provided it appears that such was the manner the parties chose to effectuate the sale initiated by the broker under his employment. Ib.

3. **Same: Facts Stated.** A contract with a real estate broker stipulated that the owner would pay him a commission on the price of the land optioned to a third person, on condition that a sale was made to him. The contract and the option were executed at the same time and delivered to the broker. The option expired, and the owner thereafter gave the third person another option, and after it expired, the owner sold the property to a corporation whose entire capital stock, with the exception of four shares, was owned by the third person, at a price greater than the option price. *Held*, that, inasmuch as the employment contract did not limit the right to recover a commission to a sale under the option and within the time and on the terms specified, the broker was entitled to a commission, if the jury found that he was the procuring cause of the sale, even though the sale was not made under the first option nor at the price therein specified. *Held*, further, that it was a question for the jury, whether the sale to the corporation was not tantamount to a sale to the person named in the contract of employment. Ib.

4. **Same: Instructions.** Where in an action by a real estate broker for a commission, the evidence showed that the broker was employed to sell the real estate to a third person who had an option to purchase it, that, upon the expiration of the option, defendant gave the third person a second option, and, after the expiration of that option, sold the property to a corporation organized by him, and the facts justified a finding that plaintiff was the procuring cause of the sale and that the sale to the corporation was equivalent to a sale to the third person, an instruction that, before plaintiff could recover, the jury must find that the property was sold to the corporation "in pursuance of and under the renewal option," was misleading, as leading the jury to believe that it was a condition precedent to plaintiff's right to recover that the renewal option continued in force to the time of the conveyance, when, as a matter of fact, such was not a condition precedent. Ib.

5. **Right to Commission: Instructions.** In an action by a real estate broker for a commission for effecting the sale of land, there was evidence tending to show that plaintiff was employed to sell the land to a third person who had an option to purchase it at $60 per acre; that the option was twice renewed by defendant, the last renewal stipulating that the price should be $65 per acre; that, prior to the expiration of the last renewal, the land was sold to a corporation organized by the third person, plaintiff's evidence being, that the price was $65 per acre, while defendant's evidence was, that the price was $60 per acre. The court instructed, at the instance of defendant, that before plaintiff could recover, the jury must find that the land was sold "in pursuance of and under the renewal option. MM, that the instruction was erroneous for denying a recovery if the jury found that the sale was for $60 per acre;

Digitized by Google

REAL ESTATE BROKERS—Continued.

plaintiff being entitled to recover if he was the procuring cause of the sale, regardless of whether or not the sale was made under and in pursuance of the renewal option. Cole v. Marler et al., 223.

RECORDING INSTRUMENTS. See Sales.

REPLEVIN.

1. **Personal Property Affixed to Realty: Agreement That it Shall Remain Personal Property Until Paid for.** In a written contract creating a conditional sale of machinery executed by the vendor and the owner of land before the machinery was affixed to the realty, it was expressly stipulated that the machinery should remain personal property until paid for and should not become real estate by reason of being in any manner affixed to the real estate, and that vendor should have the right to remove same if not paid for, it was held that, as between the parties to such contract and subsequent purchasers with notice thereof, or whose rights are expressly subject to such agreement, effect will be given to such agreement and the machinery will remain personal property and be removable by the vendor if not paid for, in the absence of a statute forbidding such agreements. And replevin will lie for such machinery after default in the payment of the purchase price or deferred payments. Amer., etc., Co. v. Sedalia, etc., Co., 485.

2. **Same.** Where, in a written contract made in reference to personal property before it is attached to real estate, is is expressly stipulated that it shall remain personal property and shall not be considered real estate by reason of being attached to land in any manner, such stipulation will be given effect and there is no limitation upon the right of the parties to make such an agreement, as between themselves and subsequent purchasers with notice, unless the property is in its essential nature, such that it loses it identity by being incorporated into the realty and its removal would result in its destruction. Ib.

ROADS AND HIGHWAYS.

1. **Public Road: Road District: Consolidation: Pleading.** If a person obstructs a public road in a road district and fails to remove it within ten days after notice from the road overseer, he is liable to a penalty of $5 per day, to be recovered by an action instituted by the overseer in the name of the district. F obstructed a road and was notified by the overseer to remove it. Then that district was taken into and became a part of an adjoining special district. The overseer then instituted an action against F in the name of the latter district. It was held to be properly brought. Boonville, etc., District v. Fuser, 573.

2. **Same: Pleading: Willfully or Knowingly: Equivalent Words.** The statute (Sec. 10533, R. S. 1909) provided that anyone who shall "willfully or knowingly" obstruct a public road shall be liable to a penalty of $5 per day after notice from the overseer to remove it, to be recovered by an action in the name of the district. The petition failed to charge that the obstruction was made willfully or knowingly, but did charge that after notice he refused to remove it and continued to maintain it, It was held that this was equivalent to charging willfulness and knowledge. Ib.

SALES.

1. **Personal Property: Cash: Title.** As between the parties, a sale of personalty for cash does not pass title to the property if the money is not paid by the buyer. Boyd v. Bank, 431.

Digitized by Google

SALES—Continued.

2. **Same: Bill of Lading: Check for Purchase Money: Transfer of Bill: Value not Paid.** A seller and purchaser resided twelve miles apart. The seller, at the direction of the buyer, loaded a car of corn at the seller's residence, for shipment to market, and took from the railway company a bill of lading in the buyer's name. He then sent the bill of lading to the buyer by mail together with the wieght of the corn showing that it came to $575 at the purchase price per bushel. It was agreed the buyer, on receipt of the bill, should send his check in payment by mail to the seller. The buyer did not do so, but immediately upon receiving the bill transferred it, with a draft attached for $575 to a bank at his place, the latter entering that amount on its books as a credit to the buyer. The bank had no notice that the seller had any interest in the corn, but it did not pay out any money for the bill; on the contrary collected the proceeds of a sale of the corn. *Held*, that the sale was for cash, and that no title passed to the buyer and that the bank was liable to the seller for the purchase price. Ib.

3. **Same: Bill of Lading: Negotiable: Notice: Value.** While a bill of lading is negotiable and its transfer will take the title to the proerty, it will not havethat effect if the transferee has notice of lack of title; or, pays nothing for it. Ib.

4. **Conditional Sales: Recording: Subsequent Purchasers with Notice.** A contract which is a conditional sale and not a chattel mortgage does not have to be recorded in order to be valid as to subsequent purchasers with actual notice. Amer. etc., Co. v. Sedalia, etc., Co., 485.

SCHOOL DISTRICT.

1. **Exercise of Police Power: Amenability of Schools and School Employees to Police Regulations.** A fireman in charge of a steam boiler who was required by a city ordinance to be examined and licensed cannot defend a charge of violating said ordinance by showing that he was employed by the school district to manage said boiler. The ordinance was an exercise of purely police power affecting the health and safety of persons, and freedom from danger of destruction of the property of the city and of its citizens, and was, in no sense an interference with or encroachment upon the authority of the school board or its work of controlling, directing and maintaining its system of education. Kansas City v. Fee, 501.

2. **Same: Municipal Corporations: Spheres of Action Belonging Respectively to the City and the District.** Our laws have committed to the school boards the work of educating, and furnishing free public instruction to, the young of the state, but has not given to such boards governmental police power. That is committed to the city. Neither can interfere with the other in its respective domain. The school district can perform its work and still be amenable to necessary police regulations. In this case the district by its rule admits this, and it is only the employee who attempts to raise this objection on behalf of the district. Ib.

STATUTES. See **Accounts; Carriers of Live Stock; Damages; Motions to Retax Costs.**

STATUTE OF FRAUDS.

1. **Original Undertaking not Within.** Where a bank, upon the presentation of the checks of an athletic club refused to pay same because the club had no funds, was told by defendant that if it

Digitized by Google

STATUTE OF FRAUDS—Continued.

would pay out the money called for by the checks and others that had been given but not yet presented, he would himself pay them, and the bank, in sole reliance upon such promise, paid out the money sued for on such checks, defendant will be liable to the bank, as upon an original undertaking even though defendant's promise was oral, since the Statute of Frauds does not apply in such case. Rubey Trust Co. v. Weidner, 692.

2. **Same: What is Such an Undertaking.** The agreement must be an express agreement on the part of defendant himself to pay, and not a promise to pay the club's debt, if it did not, and the money must have been paid out solely on the credit of such agreement and not on the strength of credit extended either in whole or in part to the club. Ib.

3. **Same: Jury Question.** If the agreement claimed by plaintiff was an original undertaking, and not a promise to pay the debt of another, and credit was not in fact extended to the club, then the mere fact that, for convenience of bookkeeping, the checks paid were kept on the books as an account of the club will not defeat plaintiff's claim. Such is fact a circumstance bearing on the question whether credit was given to the club or not, but it is not conclusive of that fact. And it is for the jury to say whether defendant assumed the attitude of principal or stood merely as a security for the club. Where there is any evidence to show an original undertaking on the part of defendant to pay, the jury's verdict finding that it was such an undertaking cannot be overturned. Ib.

4. **Same: Accepting Deed of Trust from Club Afterward.** Such original undertaking is not destroyed nor is credit extended to the club by the acceptance afterward of a deed of trust from the club, where it clearly appears that the bank, did not seek, but was offered, the deed of trust by the club, and it was known that it was very doubtful whether the deed of trust was of any value and was accepted by the bank merely on the condition that, if anything was realized over and above other liens, it would be accepted by the bank to reduce the debt. Ib.

5. **Consideration: Verbal Promise.** In order to take a verbal promise out of the Statute of Frauds requiring an agreement to pay the debt of another to be in writing, there must be some consideration moving to the promissor, unless the original debtor is released and the debt discharged. Martin v. Harrington, 707.

6. **Same: Discharge of Debt: Original Promise.** Where a third party promises a creditor to pay an existing debt of his debtor if the creditor will release the debtor and discharge the debt, and the creditor agrees and does it, the promissor's promise is an original undertaking and need not be in writing. In such case, the debt being discharged, there is no "debt of another person" and the Statute of Frauds does not apply. Ib.

7. **Same: Demurrer: Procedure.** A demurrer is not the proper procedure to take advantage of the Statute of Frauds. Ib.

STATUTES CITED AND CONSTRUED.

SESSION ACTS.

Laws 1887, p. 187, see page 308.
Laws 1895, p. 35, see page 213.
Laws 1905, p. 135, see page 19.
Laws 1909, pp. 382, 94, see pages 32, 215.

Digitized by Google

REVISED STATUTES OF 1879.

Section 110, see page 208.
Section 119, see page 213.

REVISED STATUTES OF 1889.

Section 2453, see page 450.

REVISED STATUTES OF 1899.

Section 6761, see page 31.
6762, see page 31.
4749, see page 167.
4750 see page 167.
4751, see page 167.
2276, see page 168.

REVISED STATUTES OF 1909.

Section 114, see page 207.
115, see page 207.
116, see page 208.
119, see page 205.
120, see page 215.
650, see page 156.
651, see page 156.
652, see pages 158, 163, 168.
655, see page 157.
657, see pages 158, 163, 168.
1745, see page 464.
1832, see page 295.
1965, see page 550.
1972, see page 84.
1985, see page 663.
2000, see page 473.
2023, see page 379.
2084, see page 122.
2119, see page 466.
2248, see page 307.
2249, see page 307.
2783, see page 707.
2889, see page 491.
3004, see page 314.
3005, see page 314.
3049, see page 450.
3145, see page 725.
3150, see page 231.
3151, see page 545.
4835, see page 168.
5425, see page 23.
5440, see page 444.
7020, see page 545.
7043, see page 294.
7068, see page 44.
7180, see page 514.
7182, see page 514.
7184, see page 514.
7191, see page 472.
7586, see page 723.
7882, see page 572.
7883, see page 572.
8054, see page 311.
8094, see page 168.
8212, see page 417.
8308, see page 234.
8304, see page 234.
8309, see page 234.
9764, see page 505.
9848, see page 178.
9849, see page 178.
10478, see page 460.
10553, see pages 460, 575.
10784, see page 504.
10979, see page 504.
10980, see page 504.
10983, see page 504.
11764, see page 460.
11956, see page 434.
11957, see page 434.

STATUTES, CONSTRUCTION OF. See **Damages; Executions; Food; Tax Bills.**

1. **Construction: Considering Other Statutes.** A statute should not be construed as if it stood alone—as being complete in itself and unaffected by other statutes, but all consistent statutes should be construed together, as constituting one act. State v. Shortell, 153.

2. **Same: Considering Title.** It is proper to consider the title of an act as an aid in construing its provisions. Ib.

3. **Same: Criminal Satutes.** Criminal and penal statutes are to be strictly construed in favor of accused and against the State, both as to the charge and the proof. Ib.

4. **Construction: Retrospective Operation.** Statutes should be construed as prospective in intention and application, unless their language clearly calls for retrospective operation. Gilsonite, etc., Co. v. Greffet, 176.

Digitized by Google

STATUTES, CONSTRUCTION OF—Continued.

5. **Same:** Even remedial statutes are not allowed a retrospective operation when they create an additional disability or otherwise impair vested rights. Gilsonite, etc. Co. v. Greffet, 176.

6. **Statutory Construction: Remedial Statutes.** A statute which is highly remedial in character is to be construed so as to carry out the spirit and purpose of the Legislature, notwithstanding it is not in entire consonance with the common law, and it is the duty of the court to enlarge or restrain the meaning of words herein employed, to the end of effectuating the Legislative intent. In re Ryan, 202.

7. **Statutory Construction.** It is the duty of the courts, in construing statutes, to interpret particular words by reference to the context, so as to effect the legislative intent as shown by the entire enactment, if such may be fairly ascertained, rather than to declare the precise meaning of the words standing alone. Ib.

8. **Same.** Statutes in *pari materia* should be construed together, Ib.

9. **Construction: Penal Statutes.** A highly penal statute which provides a new and extraordinary remedy must be construed strictly, both as to the cases embraced within its terms and as to the methods to be pursued. In re Koehler, 297.

STREET RAILWAYS. **See Negligence.**

TAX BILLS.

1. **Jurisdiction: Interest.** In order to confer jurisdiction of the subject-matter on the court in any action to enforce the lien of a special tax bill, the action must have a defendant or defendants who own the land sought to be charged or some interest or estate in it and the judgment can affect only such interest or estate. Barber Asphalt Pav. Co. v. Field, et al., 11.

2. **Same.** An action to enforce the lien of a special tax bill issued under the provisions of the Kansas City Charter is not *in rem* until after jurisdiction of the subject-matter has been acquired by the court in which the action is being prosecuted. Ib.

3. **Same: Record Owner: Notice.** In a suit to enforce a special tax bill the record owner would be the proper party unless the true owner was known to the holder of the bill. If the owner of the property fails to record his deed, and a tax lien holder brings his action against one who appears to be the owner by the record, not having notice of the title of the real owner, and proceeds to judgment and sale, it will convey the title in a way similar to the instance of one purchasing from the record owner without notice of any other title. Ib.

4. **Special Tax Bills: Notice of Suit: Requirements: Statutes: Construction.** Sec. 9848, R. S. 1909, provides that, whenever any suit shall be commenced to enforce the lien of a special taxbill in cities having over 300,000 population, the plaintiff, within ten days after commencing it, shall file with the city comptroller a written notice stating when and in what court the suit has been brought. Section 9849 provides that such liens shall cease in two years after the taxbill shall have become due and payable, unless suit shall have been brought thereon and notice given and filed within that time as required by section 9849. *Held*, that, although these statutes affect the remedy merely, yet as the two-year period prescribed, after which the lien is to terminate, is not a mere statute of repose

Digitized by Google

TAX BILLS—Continued.

but a limit to the existence of the lien, the requirement of notice creates an additional burden on the plaintiff and a failure to comply therewith constitutes a new defense available to the defendant, in actions on taxbills, and hence the statute should not be given a retroactive effect so as to apply to taxbills issued prior to its adoption. Gilsonite etc., Co. v. Greffet, 176.

5. **Preliminary Resolution: Implication of Law.** When the preliminary resolution for paving a public street, and the plans and specifications to which it refers, are silent on the subject of grading, the law will imply a duty on the part of the city to furnish a graded street to the contractor and a property owner would not be justified in thinking that the burden of such duty was included in the work proposed by the resolution. Jones v. Barber Asphalt Pav. Co., 393.

6. **Same: Specification of Time in Contract.** The failure of an ordinance to fix the time for the completion of the paving of a street does not invalidate the ordinance and the tax bills issued in payment of such work are not void because of long delay in letting the contract for the doing of the work, if the contract was in compliance with the ordinance and the work was done and completed in compliance with the contract. Ib.

7. **Same: Condition Precedent.** Where the charter and ordinance of Kansas City, in force at the time a resolution is passed to pave a street, does not make the filing of a preliminary estimate of the cost of the improvement a condition precedent to the enactment of the ordinance for the improvement, or the letter of the contract, then the tax bills issued for such improvement are not void because of the failure to file such preliminary estimate. Ib.

8. **Same: Guaranty to Repair.** Where a contractor breaches his guaranty to keep the pavement in good repaid, he becomes liable on his bond to respond in damages, but such a breach could not affect the validity of the tax bills issued in payment of the cost of the pavement. Ib.

9. **Street Improvements: Petition for: Authority to Bind Corporate Owner.** The law authorizing street improvements to be made upon the presentation of a petition signed by the owners of a majority of the front feet abutting on the street to be improved does not require the names of the owners to be signed in any particular way, nor that the authority to sign shall appear on the face of the petition, or be shown by any particular kind of evidence. An officer of a corporation must be authorized to sign the petition in order to bind the corporation. He has no authority, by virtue of his office, to bind the corporate owner. The authority to bind, however, does not have to be shown by a formal resolution passed by the board of directors. Authority to sign may be shown by evidence that the Board of Directors had placed all business in the hands of the officer, that he had signed similar petitions for street improvements and the directors knew of it and made no objection thereto. In fact, the authority to sign may be shown by any evidence that would be sufficient to show authority in the agent to do any other act which he could not do merely by virtue of his office. Pasche et al. v. So. St. Joseph T. Co., et al., 614.

10. **Same: Evidence: Burden of Proof: Whether Signed by Owners of Requisite Number of Front Feet.** Where the petition for the improvement states that it is signed by the owners of the requisite number of front feet, and the municipal authorities have so found

Digitized by Google

TAX BILLS—Continued.

and have acted on the petition on its merits, such record is not conclusive on this point, but it is prima facie evidence of such fact, and throws the burden of proving that the petition was not so signed upon the party who asserts that fact. Pasche et al. v. So. St. Joseph T. Co., et al., 614.

11. **Same.** In this case the evidence offered to show that the officer signing the corporate name to the petition did in fact have such authority as would and did bind the corporation, is reviewed and *held* to sufficient bind it. Ib.

TELEGRAPH AND TELEPHONES.

1. **Error in Transmitting Message: Negligence.** Proof of error in transmitting a telegram makes out a prima facie case of negligence on the part of the telegraph company. Jackson v. Telegraph Co., 70.

2. **Same: Right of Recovery: Facts Stated.** Plaintiff's agent wired plaintiff, on February 28, 1909, that wool could not be purchased for less than twenty-one and one-half to twenty-two cents per pound. Plaintiff, on March 1, wired, in response to this message, that the agent should not pay to exceed twenty-one cents per pound. This message was erroneously transmitted so as to authorize the payment of twenty-two cents per pound, and the agent bought a quantity of wool at this figure on March 2. In an action against the telegraph company, *held* that the agent's telegram concerning the price at which wool could be bought on February 28 was not conclusive as to what the market value was on March 2; *held*, further, that the agent was justified in buying wool at twenty-two cents per pound, upon the receipt of the erroneously transmitted telegram, although, by continuing negotiations with the sellers, he might have bought at a lower figure; and hence it is *held*, that defendant is liable for the difference between the amount paid by the agent for the wool bought and the market value thereof on the day and at the place of the purchase. Ib.

3. **Same: Measure of Damages: Evidence.** In an action for damages caused by erroneously transmitting a telegram authorizing plaintiff's agent to pay twenty-two, instead of twenty-one, cents a pound for wool, evidence was admissible as to the market value of wool at the place of purchase on the day the telegram was sent; the measure of damages being the difference between the market value of the wool at the time and place of the purchase and the higher price paid by plaintiff's agent because of the error in transmission. Ib.

4. **Same: Damages: Market Value: Sufficiency of Evidence.** In an action for damages caused by erroneously transmitting a telegram authorizing plaintiff's agent to pay twenty-two, instead of twenty-one, cents a pound for wool, evidence that actual sales were made at the place in question at twenty-one cents per pound two days later than the day on which plaintiff's agent purchased at twenty-two cents, and at slightly less than that three days later and at twenty cents two or three days before, was sufficient to establish the market value at the time and place in question. Ib.

5. **Delay: Rise in Price: Measure of Damages.** A telegram sent from Kirksville, Missouri, to Romeo, Michigan, directed a person at the latter place to buy 600 bushels of potatoes at fifty cents per bushel and ship to the senders at Kirksville. The telegram was negligently delayed in delivery for two days, when potatoes had risen in price to eighty cents per bushel. It was held, that on proof that the potatoes could and would have been bought at

Digitized by Google

TELEGRAPH AND TELEPHONES—Continued.

fifty cents if the message had been delivered, and that the price had advanced when it was delivered the telegraph company would be liable for damages measured by the difference in price at the place of purchase. Kerns & Lorton v. Telegraph Co., 435.

6. **Same: Negligence: Necessity for Purchase.** While generally it is true that a telegraph company negligently failing to deliver a telegram directing the purchase of merchandise, is liable for the difference in price at which the articles could have been purchased had there been prompt delivery, and the advanced price at which they were afterwards purchased—yet it is not necessary that a purchase be afterwards made, unless it will save or reduce the damages. For, if it be shown that a purchase would have been made at the lesser price if there had been prompt delivery and that when the belated delivery was made the price had risen, the difference between these will be a basis for assessment of damages for his loss in not obtaining the article at the lesser price. Ib.

7. **Same: Loss of Profits.** A telegraph company is not liable for loss of profits which might have been made out of collateral transactions, or which depend upon uncertain events. But if it is shown that merchandise ordered to be purchased by a telegraphic message were known to be intended for resale at a profit and that they could have been sold at such profit, a liability will accrue against the company. Ib.

8. **Same: Information on Face of Telegram.** The following telegram was sent from Kirksville, Missouri, to Romeo, Michigan, and was negligently delayed in delivery, viz.: "If freight rate does not exceed fifty cents per hundred buy five or six hundred bushels of potatoes at fifty cents, if good. Make draft on us with bill of lading attached. Wire as soon as bought." *Held*, that the message conveyed information to the company, on its face, that the potatoes were desired to be purchased and shipped to Kirksville immediately and they were intended for resale at a profit, and that the company was liable for the profit definitely shown could have been made. Ib.

TENANT.

1. **Notice to Quit.** A tenant at will is entitled to thirty days' notice to quit, and if it is not given he may successfully defend a possessory action for the premises. Shull v. Cummings, 569.

2. **Same: Pleading: Landlord's Title.** Where a petition by a landlord does not set up a claim of title, but merely a right to possession, an answer containing only a general denial is not a denial of the landlord's title. Ib.

TRADE-MARKS AND TRADE-NAMES.

1. **Infringement of Trade-Marks.** The infringement of a trade-mark consists of the unauthorized use or colorable imitation of it upon substituted goods of the same class as those for which the mark has been appropriated. Westminster Laundry Co. v. Hesse Env. Co., 238.

2. **Same.** It is essential to the existence of a right of action for infringement of a trade-mark that the plaintiff have an exclusive proprietary right in it and that it had been in actual use as a means of identifying the origin, ownership or manufacture of the goods

Digitized by Google

TRADE-MARKS AND TRADE-NAMES—Continued.

of its proprietor, and had been annexed to, and accompanied, the goods to market. Westminster Laundry Co. v. Hesse Env. Co. 238

3. **Same: Unfair Competition.** Unfair competition consists of passing or attempting to pass upon the public the goods or business of one person as that of another. Ib.

4. **Same: "Blind Advertising."** It is not, in every instance, a condition precedent to the right to maintain an action for unfair competition by the use of a word or phrase that the complainant have a proprietary right in such word or phrase, but it is a condition precedent to the exercise of such right that the complainant shall have used such word or phrase in his business, as a means of identifying his product, for a sufficient length of time to establish a repute therefor in the market; and hence, where an advertising agency had contracted with plaintiff laundry company to run a "blind" advertisement for it, by first printing the word "stopurkicken" on billboards and cards, without printing plaintiff's name, until the public's curiosity was aroused, when plaintiff's name was to follow in connection therewith, defendant envelope company's use of the word, before plaintiff's name had been printed in connection therewith was not unfair competition. Ib.

5. **Same: Assignability of Trade-Name: Appropriation of Words in Common Use.** One who has acquired a right to use a word or phrase in connection with his product, under such conditions as would entitle him to protection against the use thereof by another, on the ground of unfair competition, may assign such right, in conjunction with the good will of the product which such word or phrase identifies; but an advertising agent may not appropriate any word or phrase he chooses and confer on another an exclusive right to use the same by a contract to use it in aid of his business. Ib.

TRIAL BY COURT. **See Trial Practice.**

TRIAL PRACTICE.

1. **Witnesses: Impeachment by Contradiction.** Where it is desired to contradict a witness by proving contradictory statements made in a prior written account of the affair, the witness must be shown such statement and his attention called to the contradictory statement, before it can be offered in evidence to impeach him. Where the evidence shows that the witness did not write the statement but merely signed it without reading, simply showing the witness his signature and getting him to identify it is not sufficient to render the statement admissible. Its exclusion, therefore, was not error. Ebert v. Railway, 45.

2. **Separate Findings of Fact and Law: Refusal.** In an action at law, the refusal of the trial court, upon due request therefor, to state in writing the conclusions of fact found separately from the conclusions of law, as required by Sec. 1972, R. S. 1909, is reversible error. Backer v. Ins. Co., 82.

3. **Same: Equity Case.** The trial court's failure to make separate findings of fact and conclusion of law on request, as required by Sec. 1972, R. S. 1909, is not reversible error in any equity case. Ib.

4. **Same.** The trial court cannot be required to give declarations of law and also to make findings of fact and conclusions of law under Sec. 1972, R. S. 1909, but it is required to do one or the other upon due request therefor. Ib.

Digitized by Google

TRIAL PRACTICE—Continued.

5. **Same.** Where, after a demand for a separate statement of conclusions of fact and law had been made by plaintiff, the court requested counsel to submit suggestions for such findings, and the suggestions submitted were rejected, the fact that such suggestions were submitted would not deprive plaintiff of his right to have the court make a separate statement of conclusions of fact and law in compliance with Sec. 1972, R. S. 1909. Ib.

6. **Attachment: Setting Aside Order of Sale: Jurisdiction.** A motion to revoke an order of sale of attached goods and to set aside a sale thereunder, if filed at the term during which the order was made and continued to the next term, may be acted upon at the next term. Mitchell v. Greely et al., 250.

7. **Evidence: Leading Questions.** In an action for personal injuries sustained by reason of "an unusual, sudden and extraordinary jerk in starting and thereupon instantly stopping" a street car, a question propounded to a witness on direct examination, "Was there anything unusual in the starting or stopping of the car?" was leading, and an objection thereto was, therefore, properly sustained. Esque v. Railway, 317.

8. **Evidence: Admissibility.** The fact that improper testimony is admitted on behalf of one party without objection from the adverse party does not give the latter the right to introduce improper testimony in rebuttal, over the objection of the other party. Ib.

9. **Directing Verdict: When Proper.** Where the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is sufficient to support a verdict for the plaintiff, so that such a verdict, if returned, would have to be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant; otherwise, the case is for the jury. Goodes v. Order of U. T. C. of A., 330.

USURY. See Contracts.

VERDICTS. See Contracts; Damages; Practice Appellate.

WAIVER. See Fire Insurance; Fraternal Beneficiary Associations; Life Insurance.

WARRANTY. See Accounts.

WIDOW. See Definition; Executors and Administrators.

WITNESSES. See Trial Practice.

1. **Husband and Wife: Competency.** The husband or wife is competent to testify when he or she is a substantial party to the suit and is interested in the result, except as to confidential communications between them. Pace et al. v. Railroad, 227.

2. **Same: Married Women: Damage to Crops: Competency of Husband.** While the Married Woman's Act (Secs. 8304, 8308 and 8309 R. S. 1909 et al.) dissolved the prior unity of husband and wife and allows her to take the issues and profits of her separate estate, yet, in view of section 8308, providing that the natural products of the wife's land may be attached or levied upon to liquidate the husband's debts contracted for necessaries for the wife and family, a husband lives with his wife on her land, cultivates it and employs the issues thereof for the livlihood of the family, has such an interest in such issues that, in an action by him and his wife for damages to growing crops, he is a competent witness. Ib.

Digitized by Google

WITNESSES—Continued.

3. **Privileged Communications: Attorney and Client.** In an action for personal injuries, counsel for defendant undertook to have plaintiff testify, on cross-examination, as to the information upon which she relied when she advised her counsel concerning the injuries she alleged she had sustained. As interpreted by the trial court, the question called for testimony concerning the statements made by plaintiff to her counsel concerning her injuries. On objection by counsel for plaintiff that the question called for a privileged communication between attorney and client, the question was excluded as being improper in the form asked. *Held*, that this ruling was correct. Erdmann v. Railway, 245.

Digitized by Google

Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—Diminution of Records. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court. If the opposite party shall

Digitized by Google

contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—Evidence—Bill of Exceptions to be Allowed, When. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—Exceptions—Questions to be Embodied in Bill. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—Duty of Circuit Court Clerks in Making Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the ——— day of ———*, 188—, *executed on the ——— day of ———*, 188—;" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—Bill of Exceptions in Equity Cases. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—Abstract and Briefs to be Filed and Served. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions

Digitized by Google

presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—Citing Authorities in Briefs. In compliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side paging shall be set forth. The respondent, in his statement, may adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

RULE 17.—Appellant's Brief to Allege Errors Complained of. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

Digitized by Google

RULE 19.—Agreed Statement of the Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—Motion for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—Motion for Affirmance. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—Extending Time for Filing Statement, Abstracts, Etc. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him, and will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will thereupon make his statement and answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and in such cases the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by writ ten notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

Digitized by Google

RULE 25.—When Appeal is Returnable—Certificate of Judgment—Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

RULE 26.—Record Entries Perfecting Appeal not to Be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then, absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be true, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

(Adopted, January 6, 1913.)

Digitized by Google

Rules of Practice in the St. Louis Court of Appeals.

REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

Rule 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court Room.

Rule 2.—Words Appellant and Respondent, What They Include. Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—Motions. All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

Rule 4.—Hearing of Causes. Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

Rule 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

Digitized by Google

Rule 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

Rule 10.—Duty of the Clerk in Making Up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the ——— day of ——— 190—, executed on the ——— day of ———, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served. In those cases where the appellant shall, under the provisions of section 813, Revised Statutes of 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstracts above referred to and of any

Digitized by Google

objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

Rule 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

Rule 14.—Abstracts—When Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes 1899, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

Digitized by Google

the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

Rule 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—Citing Authorities in Brief. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

Digitized by Google

Authorities incorrectly cited as to book, page or title of case, will be disregarded.

Rule 20.—Extension of Time. Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—Agreed Statement of Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. See Barnett et al. v. Colonial Hotel B. Co., 119 S. W. 471; 137 Mo. App. 636.

Rule 24 is hereby amended to read as follows:

Rule 24—Oral Arguments. When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, and if he has not consumed all of his time in opening. The whole time consumed by either party in statement and argument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a Justice of the Peace, the time for argument shall not exceed thirty (30) minutes on each side.

Digitized by Google

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court *in extenso* the written or printed argument on file, nor from reports or text books.

The above rule to be in force and effect on and after June 6, 1910.

Rule 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—Allowance to Garnishees. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

Rule 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

Digitized by Google

ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—Withdrawing Records. No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

Rule 32.—Repeal of Former Rules. All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

Rule. 33.—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.

Rule 34. An appellant having filed a certified copy of the order granting an appeal,

(a) Need not abstract the record entries showing the steps taken in the trial court to perfect such appeal. If the abstract

Digitized by Google

states that the appeal was duly taken, then, absent a certified transcript of the record showing to the contrary, it will be presumed that the proper steps were taken at the proper time and term.

(b) No appellant or plaintiff in error need abstract record entries evidencing his leave to file or various extensions of time granted for filing, a bill of exceptions, but it will be sufficient if his abstract states that the bill of exceptions was duly filed.

The burden, in either of the above paragraphs a or b, will then be upon the respondent or, in writs of error, upon defendant in error, to produce in this court a transcript of the record, or of as much thereof as is necessary, duly certified by the clerk of the trial court, showing the contrary to be the fact, if he make the point.

(c) When the respondent or defendant in error desires to challenge the abstract of the record for any of the above defects, he shall give notice in writing to the opposite counsel, which notice shall be served upon such counsel within ten days after the abstract has been served, failing which, no such objection will be entertained. Such notice, shall, at least five days after service thereof, be filed with the clerk of this court, together with certified transcript of record above required.

[Adopted December 14, 1912.]

Digitized by Google

RULES OF PRACTICE

IN THE

SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the court room.

RULE 2.—Words Appellant and Respondent, what they include. Whenever the word appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

RULE 3.—Motions. All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

RULE 4.—Hearing of Causes. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

RULE 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

RULE 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove,

Digitized by Google

then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

RULE 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

RULE 10.—Duty of the Clerk in Making up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

RULE 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule, and dispense with the necessity of any further transcript.

RULE 14.—Abstracts, when Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty

Digitized by Google

days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

RULE 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the question and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Provided: In all cases wherein there are statements or other evidence in the printed abstracts of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal, and any statement that the bill of exceptions was signed, sealed or made a part of the record will be taken to be a statement that said bill of exceptions was signed, sealed and filed and made a part of the record at the proper time and in the proper manner, such abstracts shall be deemed sufficient as to any of the aforesaid matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be a sufficient objection to state that the abstract does not show such steps were taken in proper time or in a proper manner, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time or in proper manner, as the case may be, and thereupon, the Court shall determine the matter and the costs thereof shall be taxed as the Court shall deem just. (Amended January 3, 1911, to take effect February 1, 1911.)

RULE 16.—When Appeal Is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2043, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

RULE 17.—Costs, when Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 2048, Revised Statutes 1909, which fails to make a full presentation of all the record nec-

Digitized by Google

essary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

RULE 18.—Briefs, what to Contain and when Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

RULE 20.—Continuing and Resetting Cases. No case shall be reset or continued, or time extended for filing statements, abstracts or briefs, on mere agreement of counsel, but only for sufficient cause shown, and by order of the court. (Effective December 1st, 1910.)

RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard

Digitized by Google

from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

RULE 22.—Agreed Statement or Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

RULE 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

RULE 24.—Oral Arguments. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant in error replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

RULE 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 26.—Motion for Affirmance. On motion for affirmance under section 2047, Revised Statutes 1909, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Digitized by Google

RULE 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 28.—Allowance to Garnishees.—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

RULE 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

RULE 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

RULE 31.—Withdrawing Records. No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

RULE 32.—Record Entries Perfecting Appeal not to be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

Adopted March 3, 1913.

Digitized by Google

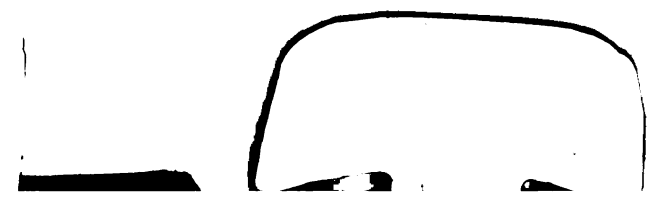
Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google



Digitized by Google

Digitized by Google